EXHIBIT "A" to amended complaint

58-A

The Atchison, Topeka and Santa Fe Railway Company

COAST LINES

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order.

At Conejo Calif Oct 7th 193[illegible]

From MID STATE HORTICULTURAL CO., Inc.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to Mid state Horticultural Co Inc (Mail or street address of consignee—For purposes of notification only.)

Destination Kansas City State of Mo County of

Route Belen A T & S F

Delivering Carrier Car Initial DFRD Car No. 174094

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	Class or Rate	Check Column
582	Cases Lettuce Iceberg			
	Brand Jumbo Trophy 12	29106		
	Less Minimum Car Loaded			
	2% Salt First & Second Quality Lettuce only No salt with mutual icing			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

MID STATE HORTICULTURAL CO., Inc

(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

(Agent or Cashier)

Per (The signature here acknowledged only the amount prepaid.)

CAR ORDERED 10/6 3P

CAR PLACED 10/7 7A

CAR LOADED 10/7 8P

CAR RELEASED 10/7 9P

PRE-ICED

This is to certify that the articles herein mentioned are packed in STANDARD RAILROAD CONTAINERS, Loaded, Braced, and Sealed in Car as required.

MID STATE HORTICULTURAL CO., Inc.

Signature.

S. L. & C.

Charges Guaranteed—Bonds Filed

CAR UNDER ICE

STD. REFRIGERATION

Consigned to Mid State Horticultural Co Inc (Mail or street address of consignee—For purposes of notification only.)

Destination Kansas City State of Mo County of

Route Salina A T & S F

Delivering Carrier Car Initial DTRD Car No. 174094

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	Class or Rate	Check Column
882	Load Los Angeles Sugar Almonds			
	Blank Junk Property	29106		
	No Necessary Car Found			
	270 Salt First & Second Decks Only No salt with mixed Loading	S. L. & C.		

Charges Guaranteed—Bonds Filed

CAR UNDER ICE
STD. REFRIGERATION

CAR ORDERED	10/6	AM
CAR PLACED	10/7	7a
CAR LOADED	10/11	8 P
CAR RELEASED	10/11	9 P
PRE-ICED		

This is to certify that the articles herein mentioned are packed in STANDARD RAILROAD CONTAINERS, Loaded, Braced, and Sealed in Car as required.

MID STATE HORTICULTURAL CO., Inc.
Signature.

Subject to Section 7 of conditions. If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

MID STATE HORTICULTURAL CO., Inc.
(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

(Agent or Cashier)

Per (The signature here acknowledged is not receipt.)

Charges advanced:

$

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

MID STATE HORTICULTURAL CO., Inc. Shipper.

Per

Permanent post-office address of shipper

Agent or cashier not to sign this Shipping Order and must sign the Original Bill of Lading.

EXHIBIT "A"

CONTRACT TERMS AND CONDITIONS

[fol. 53c] EXHIBIT "B" TO AMENDED COMPLAINT

Jerome Distributing Co., Inc.
66 Harrison Street
New York, N. Y.

Notice No. 2214

Nov. 19, 19—.

Special Notice to Penn, (Name of Railroad) at Man Prod Yds Kearney NJ (Destination)

Please take notice that as to Car RD 17404

containing grapes { Shipped / diverted / reconsigned } 10/7/32 (Date)

from Calif. (Point of origin, diversion or reconsignment) to us, we are agents only and have no beneficial title in the property contained in car.

(The following additional information must be given in connection with cars diverted or reconsigned.)

The beneficial owner of the property is Midstate Hort. Co. Inc. (Name)

Fresno Calif.
(Address of beneficial owner)

This notice is given pursuant to the provisions of amended paragraph (2) of section 3 of the Interstate Commerce Act, effective March 4th, 1927.

Jerome Distributing Co., Inc., By B. Cutilelbery.

Pennsylvania Railroad Produce Terminal Nov 21 8 33 AM 32 Piers 27-28-29 New York City (Stamped.)

[fol. 53-d] EXHIBIT "C" TO AMENDED COMPLAINT

The Mid-State Horticultural Company, Inc., a Corporation of the State of California, hereby agrees that:

Whereas, The Pennsylvania Railroad Company is urging against the said Mid State Horticultural Company, Inc. a claim for the proper and lawful transportation charges, aggregating (subject to correction) $13,678.86, on twenty-one shipments of grapes made by the said Mid State Horticul-

tural Company, Inc. from points in California during the month of October, 1932, which were moved to New York City or vicinity, and there delivered to the Jerome Distributing Company, Inc. during the month of November, 1932, which shipments, identified by car number, and the amount due on each thereof, are as follows:

PFE 36495	$687.73	PFE 71402	$682.63
PFE 24375	683.83	PFE 35599	638.33
PFE 1478	660.43	PFE 28824	667.33
PFE 71971	589.38	PFE 71097	583.38
PFE 36105	689.73	PFE 14118	579.03
PFE 14745	662.83	PFE 16444	671.53
PFE 13607	670.33	PFE 32461	682.43
PFE 15847	658.13	PFE 16386	619.63
SFRD17404	695.51	SFRD18007	621.58
SFRD22471	698.33	PFE 13520	617.58
			$13,678.86

And whereas The Pennsylvania Railroad Company proposes to bring suit against the said Mid State Horticultural Company, Inc. looking toward the recovery and collection of such charges on October 28, 1935:

And whereas the said Mid State Horticultural Company, Inc. desires additional time for investigation and consideration of said claim, and thus requests The Pennsylvania Railroad Company to withhold the institution of any such [fol. 53-e] action until January 1, 1936:

And whereas the Pennsylvania Railroad Company is willing, in the hope that the said Mid State Horticultural Company may conclude to pay said claim without the necessity of litigation, to defer the institution of suit thereon until January 1, 1936, or until such earlier date as the said Mid State Horticultural Company may definitely refuse to pay said claim, the understanding being that The Pennsylvania Railroad Company may then institute such a suit within a reasonable time, not exceeding one month, after January 1, 1936, or after the date of such refusal to pay.

Now, therefore, in consideration of the forebearance of The Pennsylvania Railroad Company to bring such a suit against the Mid State Horticultural Company, Inc. prior to October 28, 1935, the said Mid State Horticultural Company, Inc. hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an

action, it, the said Mid State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.

This agreement is not an admission of the alleged debt by the Mid State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid State Horticultural Company, Inc. may have to said claim.

Dated at Philadelphia, Pa. this 25th day of October, 1935.

[fol. 53-f] Mid State Horticultural Company, Inc.
By (S) A. Setrakian, Vice-President.

[fol. 54] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

DEMURRER TO FIRST AMENDED COMPLAINT—Filed August 18, 1936

Comes now the above named defendant and demurring to plaintiff's first amended complaint on file herein alleges:

I

That said first amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

II

That the above entitled court has no jurisdiction of the person of the defendant.

III

That the above entitled court has no jurisdiction of the subject of the alleged causes of action therein contained.

IV

That as to the first cause of action therein contained:

(a) Said first cause of action does not state facts sufficient [fol. 55] to constitute a cause of action against this defendant.

(b) That said first cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

V

That as to the second cause of action therein contained:

(a) Said second cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said second cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

VI

That as to the third cause of action therein contained;

(a) Said third cause of action does not state facts sufficient to constitute a cause of action against this defendant.

[fol. 56] (b) That said third cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

VII

That as to the fourth cause of action therein contained:

(a) Said fourth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said fourth cause of action does not state facts sufficient to constitute a cause of action, in that it appears

on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

VIII

That as to the fifth cause of action therein contained:

(a) Said fifth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said fifth cause of action does not state facts [fol. 57] sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

IX

That as to the sixth cause of action therein contained:

(a) Said sixth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) Said sixth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

X

That as to the seventh cause of action therein contained:

(a) Said seventh cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said seventh cause of action does not state facts sufficient to constitute a cause of action, in that it appears [fol. 58] on the face thereof that the same is barred by the

provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XI

That as to the eighth cause of action therein contained:

(a) Said eighth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said eighth cause of action does not state facts sufficient to constitute a cause of action, in that appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XII

That as to the ninth cause of action therein contained.

(a) Said ninth cause of cation does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said ninth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions [fol. 59] of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XIII

That as to the tenth cause of action therein contained:

(a) Said tenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said tenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commeree Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XIV

That as to the eleventh cause of action therein contained:

(a) Said eleventh cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said eleventh cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act, [fol. 60] as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XV

That as to the twelfth cause of action therein contained:

(a) Said twelfth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said twelfth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XVI

That as to the thirteenth cause of action therein contained:

(a) Said thirteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said thirteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

[fol. 61] (c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XVII

That as to the fourteenth cause of action therein contained:

(a) Said fourteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said fourteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XVIII

That as to the fifteenth cause of action therein contained:

(a) Said fifteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant:

(b) That said fifteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of [fol. 62] the subject of the alleged cause of action.

XIX

That as to the sixteenth cause of action therein contained:

(a) Said sixteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said sixteenth cause of action does not state facts sufficient to constitute a cause of action in that it appears on the face thereof that the same is barred by the

provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XX

That as to the seventeenth cause of action therein contained:

(a) Said seventeenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said seventeenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

[fol. 63]

XXI

That as to the eighteenth cause of action therein contained:

(a) Said eighteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said eighteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XXII

That as to the nineteenth cause of action therein contained:

(a) That said nineteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said nineteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XXIII

[fol. 64] That as to the twentieth cause of action therein contained:

(a) Said twentieth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said twentieth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XXIV

That as to the twenty-first cause of action therein contained:

(a) Said twenty-first cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said twenty-first cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

Wherefore, defendant prays that this demurrer be sustained, without leave to amend, and that the defendant be [fol. 65] dismissed with its costs of suit.

Edward L. Kellas, Attorney for Defendant.

Authorities in Support of the Foregoing Demurrer

Section 430 Code of Civil Procedure of the State of California.
Interstate Commerce Act, Paragraph 3, Section 16.
Interstate Commerce Act, Paragraph 2, Section 3.
Phillips v. Grand Trunk Railway, 236 U. S. 662-666.
Galveston H. & S. A. Railway Company v. Webster Company, 27 Fed. (2nd) 765 at 766.

Received copy of the within Demurrer this 18 day of August, 1936.

W. H. Stammer, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 66] In Superior Court of the State of California in and for the County of Fresno

[Title omitted]

Order Overruling Demurrer—Filed Oct. 2, 1936

It is ordered that the demurrer of the Defendant to the first amended complaint and to each cause of action thereof to the Complaint of the Plaintiff be and it is hereby overruled, and said Defendant to answer within 10 days.

[fol. 67] In Superior Court of the State of California in and for the County of Fresno

[Title omitted]

Notice of Association of Counsel for Defendant—Filed Jan. 27, 1940

To the Plaintiff above named, and to *W. H. Stammer, Esq.*, its attorney:

You and each of you will please take notice that the above named defendant this date has associated the law firm of *Sullivan, Roche & Johnson*, with offices in the Mills Tower, San Francisco, California, with the undersigned as attorneys for the defendant in the above entitled action.

Dated: this 25th day of January, 1940.

Edward L. Kellas, *Attorney for Defendant.*

Receipt of copy of the foregoing notice is admitted this 27 day of January, 1940.

W. H. Stammer, *Attorney for Plaintiff.*

[File endorsement omitted.]

[fol. 68] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO FILE AMENDED ANSWER—Filed February 10, 1941

To the Plaintiff in the Above Entitled Action and to W. H. Stammer, Esq., Its Attorney:

GENTLEMEN:

You and each of you will please take notice that on Thursday, the 13th day of February, 1941, at 9:30 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the defendant in the above entitled action will move the above entitled court, Department 3 thereof, situated in the court house, City of Fresno, County of Fresno, State of California, for an order permitting said defendant to file an amended answer to plaintiff's amended complaint on file herein, a copy of which proposed amended answer [fol. 69] is attached hereto and marked Exhibit "A".

Said motion will be made upon the following grounds, and each of them, to-wit:

1. That the granting of said order permitting said amended answer to said amended complaint will be in furtherance of justice.

2. That the filing of said amended answer, if permitted, will simplify the issues in said action to be determined by the above entitled court upon the trial thereof.

3. That said proposed amended answer is substantially in accord with the answer of said defendant to plaintiff's amended complaint on file herein, excepting that said amended answer more specifically and in greater detail sets forth the facts upon which the defense of estoppel pleaded in defendant's answer to plaintiff's amended complaint is based.

4. That said proposed amended answer neither tenders nor raises any issues of fact that are not already included in defendant's answer to plaintiff's amended complaint.

5. That said plaintiff can sustain no prejudice by reason of the filing of said proposed amended answer to plaintiff's amended complaint.

6. That the trial of said action will not be delayed by the filing of said proposed amended answer to plaintiff's said amended complaint.

Said motion will be based upon this notice of motion; [fol. 70] upon said proposed amended answer to plaintiff's amended complaint, upon defendant's original answer to plaintiff's amended complaint and upon all of the records, files and proceedings in the above entitled action.

Dated: February 10, 1941.

Kellas & Lamberson, Sullivan, Roche & Johnson,
Attorneys for Defendant.

AUTHORITIES IN SUPPORT OF MOTION

Section 473, Code of Civil Procedure.
Abbott v. *Limited Mutual Compensation Insurance Co.*, 30 Cal. App. (2d) 157
Bank of America etc. v. *Goldstein*, 25 Cal. App. (2d) 37
Hess v. *Moody*, 35 Cal. App. (2d) 401
Jenssen v. *R. K. O. Studios Inc.*, 20 Cal. App. (2d) 705

Kellas & Lamberson, Sullivan, Roche & Johnson,
Attorneys for Defendant.

[File endorsement omitted.]

[fol. 71] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

ORDER GRANTING MOTION TO FILE AMENDED ANSWER—February 13, 1941

The motion is argued by respective counsel, W. H. Stammer for Plaintiff, and Theodore Roche, for Defendant, and by the Court said motion is granted.

[fol. 72] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

AMENDED ANSWER TO AMENDED COMPLAINT—Filed February 13, 1941

Now comes the defendant in the above entitled action and for answer to the first count or cause of action contained in plaintiff's amended complaint, admits, denies and alleges as follows:

Admits all of the allegations contained in Paragraphs I, II, III, IV, V and VIII thereof.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI thereof.

Answering the allegations of Paragraph VII thereof defendant admits that it was the beneficial owner of said [fol. 73] carload of grapes, and that said Jerome Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $695.51, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 19th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Second count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

[fol. 74] Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Second count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Second count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said second count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome

Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

[fol. 75] Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $698.33, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 28th day of October, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Third count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Third count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Third count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said Third count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name,

and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before [fol. 76] accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $617.58, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 2nd day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Fourth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Fourth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of [fol. 77] Paragraph VI of said Fourth count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said Fourth count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $619.18, with interest thereon at the rate of seven per cent per annum, or any other per cent, from the 1st day of No- [fol. 78] vember, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Fifth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Fifth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Fifth count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said Fifth count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a

[fol. 79] copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $621.58, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 1st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Sixth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Sixth Count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Sixth count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said Sixth count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome [fol. 80] Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver

of the statute of limitations, and alleges that no valuable consideration passed from the plaintiff to the defendant for the execution and delivery thereof; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $667.33, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 21st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Seventh count or cause [fol. 81] of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Seventh count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Seventh count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $687.73, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Eighth count or cause of action contained in plaintiff's amended complaint, said [fol. 82] defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Eighth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Eighth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $683.83, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Ninth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

[fol. 83] Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Ninth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Ninth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $660.43, with interest thereon at the rate of seven per cent per annum, or any percent, from the 1st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Tenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and [fol. 84] VII of said Tenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Tenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $589.38, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 22nd day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Eleventh count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Eleventh count contained in said plaintiff's [fol. 85] amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Eleventh count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $689.73, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 28th day of October, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Twelfth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Twelfth count contained in said plaintiff's amended complaint.

[fol. 86] Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Twelfth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25 day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $662.83, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 1st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Thirteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Thirteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise [fol. 87] alleged, said defendant admits the allegations of Paragraph VI of said Thirteenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and plaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $670.33, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Fourteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Fourteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph [fol. 88] VI of said Fourteenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of

limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $653.18, with interest thereon at the rate of seven per cent per annum, or any percent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Fifteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Fifteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Fifteenth count contained in plaintiff's amended [fol. 89] complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $682.63, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Sixteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Sixteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Sixteenth count contained in plaintiff's amended complaint.

[fol. 90] Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $638.33, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Seventeenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Seventeenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Seventeenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant ad-
[fol. 91] mits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $583.38, with

interest thereon at the rate of seven per cent per annum, or any per cent, from the 21st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Eighteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Eighteenth count contained in said plaintiff's amended Complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Eighteenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant [fol. 92] executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $579.03, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 17th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Nineteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Nineteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Nineteenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing,

[fol. 93] a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $671.53, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Twentieth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Twentieth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Twentieth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and [fol. 94] marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $682.43 with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Twenty-First count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Twenty-First count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Twenty-First count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies [fol. 95] that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $619.63, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 9th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

And as a further, separate and affirmative defense to plaintiff's amended complaint and to each and every of the counts and causes of action therein contained, said defendant alleges:

That said amended complaint does not, nor does any of the counts or causes of action therein contained, state facts sufficient to constitute a cause of action, or any cause of action, against this defendant.

And as a further, separate and second affirmative defense to plaintiff's amended complaint and to each and every of the counts and causes of action therein set forth, said defendant alleges:

That said amended complaint, and each and every of the counts or causes of action therein contained, is barred by the provisions of Paragraph 3, section 16, of the Interstate Commerce Act of the United States of America as amended [fol. 96] (U. S. C. A., Title 49, sec. 16, par. 3).

And as a further, separate and third affirmative defense to plaintiff's amended complaint and to each and every of the counts or causes of action therein contained, said defendant alleges:

That the above entitled court has no jurisdiction of the subject-matter of the alleged causes of action, or any of them, set forth in plaintiff's amended complaint, or in any count thereof.

And as a further, separate and Fourth affirmative defense to plaintiff's amended complaint and to each and every count or cause of action therein contained, said defendant alleges:

That said plaintiff is estopped to assert any of the said alleged causes of action set forth in plaintiff's amended complaint, or in any count thereof, against this defendant, and that said estoppel is predicated upon the following facts:

I

After the issuance and delivery to defendant of each of said bills of lading referred to in each and all of the counts contained in plaintiff's amended complaint, each of said carloads of grapes was diverted to Jerome Distributing Co., Inc., as consignee, at Manhattan Produce Yards, New Jersey, excepting that said carloads of grapes referred to in Counts 10 and 17 of plaintiff's amended complaint were diverted to said Jerome Distributing Co., Inc. as consignee, at Piers 29 and 28 respectively at New York City, New York, [fol. 97] and said carload of grapes referred to in Count 13 of plaintiff's amended complaint was diverted to said Jerome Distributing Co., Inc. as consignee, at Manhattan Piers, New Jersey.

II

Upon and according to the information and belief of defendant, between and including October 28, 1932 and November 2, 1932, said plaintiff delivered to said Jerome Distributing Co., Inc., at Manhattan Produce Yards, New Jersey, each of said carloads of grapes referred to and described in Counts 2, 3, 4, 5, 9, 11 and 12 of plaintiff's amended complaint, and said Jerome Distributing Co., Inc. paid to said plaintiff all lawful freight, refrigeration and

demurrage charges for the transportation, handling and delivery of said carloads of grapes, and each of them, in the amounts set forth in said Counts 2, 3, 4, 5, 9, 11 and 12 by issuing and delivering to said plaintiff its check dated November 19, 1932, in an amount in excess of said charges, which check was then and there received and accepted by plaintiff in payment, satisfaction and discharge, among others, of said charges hereinabove in this paragraph referred to. At or about the time said check was so received by said plaintiff, as aforesaid, said plaintiff receipted in full the freight bills presented to it by said Jerome Distributing Co., Inc. for said charges and acknowledged upon said freight bills the payment to it of all of said charges, and immediately thereafter delivered said freight bills so receipted by it to said Jerome Distributing Co., Inc. which thereupon delivered said freight bills to said defendant. [fol. 98] Upon and according to the information and belief of defendant, said check hereinabove in this paragraph referred to, when presented for payment to the bank upon which it was drawn, was not honored by said bank or paid, but said plaintiff elected to hold said check and rely upon the responsibility of said Jerome Distributing Co., Inc., said consignee, for payment of the charges referred to in said Counts 2, 3, 4, 5, 9, 11 and 12 of said amended complaint, and gave no notice to defendant that said charges had been paid by said check or of the dishonoring and nonpayment of said check by said bank until on or about the 2nd day of May, 1934.

III

Upon and according to the information and belief of defendant, between and including November 9, 1932 and November 18, 1932, said plaintiff delivered to said Jerome Distributing Co., Inc., at the places to which each of said carloads of grapes had been diverted as aforesaid each of said carloads of grapes referred to and described in Counts 7, 8, 13, 14, 15, 16, 18, 20 and 21 of plaintiff's amended complaint, and said Jerome Distributing Co., Inc., paid to said plaintiff all lawful freight, refrigeration and demurrage charges for the transportation, handling and delivery of said carloads of grapes, and each of them, in the amounts set forth in said Counts 7, 8, 13, 14, 15, 16, 18, 20 and 21, excepting a balance of $2.00 due as charges on said carload of grapes referred to in Count 14 of plaintiff's amended complaint and excepting that included in said

[fol. 99] check was the sum of $2.00 paid by said Jerome Distributing Co., Inc. on account of charges thereafter payable to plaintiff upon the carload of grapes referred to in Count 19 of plaintiff's amended complaint, to which charges reference is hereafter and in Paragraph IV of this further, separate and fourth affirmative defense to plaintiff's amended complaint, made, by issuing and delivery to said plaintiff its check dated November 21, 1932, in an amount in excess of said charges, which check was then and there received and accepted by plaintiff in payment, satisfaction and discharge, among others, of said charges hereinabove in this paragraph referred to. At or about the time said check was so received by said plaintiff, as aforesaid, said plaintiff receipted in full the freight bills presented by it to said Jerome Distributing Co., Inc. for said charges and acknowledged upon said freight bills the payment to it of all of said charges, and immediately thereafter delivered said freight bills so receipted by it to Jerome Distributing Co., Inc. which thereupon delivered said freight bills to said defendant. Said balance of $2.00 due as charges on said carload of grapes referred to in Count 14 of plaintiff's amended complaint was paid by check dated November 22, 1932, referred to in Paragraph IV of this further, separate and fourth affirmative defense to said amended complaint.

Upon and according to the information and belief of defendant, said check hereinabove in this paragraph referred to, when presented for payment to the bank upon which it was drawn was not honored by said bank or paid, [fol. 100] but said plaintiff elected to hold said check and rely upon the responsibility of said Jerome Distributing Co., Inc., said consignee, for payment of the charges referred to in said Counts 7, 8, 13, 14, 15, 16, 18, 20 and 21 of said amended complaint, and gave no notice to defendant that said charges had been paid by said check or of the dishonoring and nonpayment of said check by said bank until on or about the 2d day of May, 1934.

IV

Upon and according to the information and belief of defendant, between and including November 18, 1932 and November 22, 1932, said plaintiff delivered to said Jerome Distributing Co., Inc., at the places to which each of said

carloads of grapes had been diverted as aforesaid each of said carloads of grapes referred to and described in Counts 1, 6, 10, 17 and 19 of plaintiff's amended complaint, and said Jerome Distributing Co., Inc. paid to said plaintiff all lawful freight, refrigeration and demurrage charges for the transportation, handling and delivery of said carloads of grapes, and each of them, in the amounts set forth in said Counts 1, 6, 10, 17 and 19 and the balance of said charges due upon said carload of grapes referred to in Count 19 of plaintiff's amended complaint, by issuing and delivering to said plaintiff its check dated November 22, 1932, in an amount in excess of said charges, which check was then and there received and accepted by plaintiff in payment, satisfaction and discharge, among others, of said charges hereinabove in this paragraph referred to. At or [fol. 101] about the time said check was so received by said plaintiff, as aforesaid, said plaintiff receipted in full the freight bills presented by it to said Jerome Distributing Co., Inc. for said charges and acknowledged upon said freight bills the payment to it of all of said charges, and immediately thereafter delivered said freight bills so receipted by it to Jerome Distributing Co., Inc. which thereupon delivered said freight bills—said defendant.

Upon and according to the information and belief of defendant, said check hereinabove in this paragraph referred to, when presented for payment to the bank upon which it was drawn, was not honored by said bank or paid, but said plaintiff elected to hold said check and rely upon the responsibility of said Jerome Distributing Co., Inc., said consignee, for payment of the charges referred to in said Counts 1, 6, 10, 17 and 19.

V

At no time prior to the month of May, 1933, was defendant informed that any of said freight, refrigeration and demurrage charges referred to in plaintiff's amended complaint, for the transportation, handling and delivery of said carloads of grapes had not been paid by said Jerome Distributing Co., Inc. At no time prior to the 26th day of June, 1933, did defendant know or had it been informed, that said charges, or any of them, had been paid by said Jerome Distributing Co., Inc. by said checks, or that any of said checks presented for payment to the bank upon which they were drawn had not been honored or paid by said bank.

[fol. 102]

VI

During the grape season of the year 1932 said defendant was engaged in the business, among others, of shipping and consigning to Jerome Distributing Co., Inc. a number of carloads of grapes to be sold and disposed of by said Jerome Distributing Co., Inc. for the account of said defendant upon the understanding and agreement theretofore entered into between said Jerome Distributing Co., Inc. and said defendant that said Jerome Distributing Co., Inc., upon receipt of and delivery to it of each of said carloads of grapes, would pay all lawful freight, refrigeration and demurrage charges for the transportation, handling and delivery of each of said carloads of grapes, all of which at all of said times was known to said plaintiff.

VII

Pursuant to said agreement between said defendant and said Jerome Distributing Co., Inc. and prior to the 28th day of October, 1932, said defendant had shipped and diverted to said Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, a number of carloads of grapes, which carloads of grapes were transported over the steam railroad lines of plaintiff and connecting lines, and, prior to said 28th day of October, 1932, were delivered by plaintiff to said Jerome Distributing Co., Inc. at said Manhattan Produce Yards, New Jersey, the point to which said carloads of grapes were diverted.

VIII

[fol. 103] Upon and according to the information and belief of defendant, at or about the time of the delivery of each of said carloads of grapes mentioned and referred to in Paragraph VII of this further, separate and fourth affirmative defense by said plaintiff to said Jerome Distributing Co., Inc. at said Manhattan Produce Yards, New Jersey, all freight, refrigeration and demurrage charges for the transportation, handling and delivery of each of said carloads of grapes were paid by said Jerome Distributing Co., Inc., to said plaintiff as herein above set forth. Thereupon said plaintiff receipted its freight bills for said charges and acknowledged payment to it of all of said charges and acknowledged payment to it of all of said

charges, and thereafter delivered each of said freight bills so receipted by it to said Jerome Distributing Co., Inc. which thereupon delivered said freight bills so receipted as aforesaid to said defendant.

IX

At no time prior to May, 1933, did said plaintiff, or said bank, or said Jerome Distributing Co., Inc., or anyone else, notify or advise defendant that said freight, refrigeration and demurrage charges for the transportation, handling and delivery of any of said carloads of grapes set forth in each and every count of said amended complaint had not been paid, or that any of said checks issued by said Jerome Distributing Co., Inc. to plaintiff had been dishonored or had not been paid, and at all times prior to said May, 1933, said defendant believed that all of said charges had been paid by said Jerome Distributing Co., Inc. and that no part thereof had remained unpaid.

[fol. 104]

X

The first of said carloads of grapes referred to in plaintiff's amended complaint so delivered by said plaintiff to said Jerome Distributing Co., Inc. were and are said carloads of grapes referred to and described in Counts 2 and 11 of plaintiff's amended complaint, which carloads of grapes were delivered by said plaintiff to said Jerome Distributing Co., Inc. on or about the 28th day of October, 1932.

Between said 28th day of October, 1932, and to and including the 22nd day of November, 1932, in the belief that all of said charges due and payable upon said carloads of grapes mentioned in Counts 2 and 11 of plaintiff's amended complaint had been paid, and in the belief that all of said charges for transportation, handling and delivery of those carloads of grapes which were thereafter delivered by said plaintiff to said Jerome Distributing Co., Inc., were being paid by said Jerome Distributing Co., Inc. when each of said carloads of grapes was so delivered, said defendant continued to direct the delivery to said Jerome Distributing Co., Inc. at said places to which said carloads of grapes had been diverted as aforesaid, being and constituting the carloads of grapes referred to in plaintiff's amended com-

plaint, and in each count thereof, other than and excepting said Counts 2 and 11.

XI

If defendant had been notified or advised or had known that said Jerome Distributing Co., Inc., was not paying said charges as aforesaid, upon the delivery to and receipt [fol. 105] by it of any of said carloads of grapes, after the said carloads of grapes referred to and described in Counts 2 and 11 of plaintiff's amended complaint, said defendant would have immediately stopped and prevented the delivery of any further carloads of grapes to said Jerome Distributing Co., Inc. until and unless said charges upon each and every carload of grapes referred to and described in each and every of the remaining counts of said amended complaint had been paid in full by said Jerome Distributing Co., Inc. and defendant would have taken immediate proceedings to enforce the payment by said Jerome Distributing Co., Inc. of said charges upon each of said carloads of grapes mentioned and described in said Counts 2 and 11 of said amended complaint.

XII

After the acceptance of said check referred to in Paragraph II of this further, separate and fourth affirmative defense to plaintiff's amended complaint and the dishonoring thereof by said bank upon which said check was drawn and the refusal of said bank to pay said check, said plaintiff continued to deliver to said Jerome Distributing Co., Inc. all of said carloads of grapes so shipped and consigned, or shipped and diverted, to it by said defendant and referred to in plaintiff's amended complaint excepting in Counts 2 and 11 thereof, and during said period of time continued to accept, in payment of the charges upon said carloads of grapes, said checks of said Jerome Distributing Co., Inc. hereinabove in Paragraphs II, III and IV of this further, separate and fourth affirmative defense to said amended [fol. 106] complaint, and each and every count thereof, and upon the said delivery of each of said carloads of grapes said plaintiff receipted the freight bill therefor and acknowledged the payment to it of all of said charges, and immediately thereafter delivered each of said freight bills

so receipted to said Jerome Distributing Co., Inc. which thereupon delivered to said defendant said freight bills so receipted as aforesaid.

XIII

Thereafter and on or about the 20th day of December, 1932, defendant finally settled its account with said Jerome Distributing Co., Inc. involving the receipt by it and sale and disposition of all of said carloads of grapes and in the belief that all of said transportation charges had been paid in full by said Jerome Distributing Co., Inc. to said plaintiff, and having no knowledge or information that said charges had not been paid in full, in settlement of said accounts, said defendant gave credit to and said Jerome Distributing Co., Inc. received credit from said defendant for the payment of all of said transportation charges as aforesaid.

Upon said settlement the sum of $790.00 became due from said defendant to said Jerome Distributing Co., Inc., which sum has never been paid to said Jerome Distributing Co., Inc., but is still in possession of defendant.

XIV

At all of said times and until May, 1933, said plaintiff withheld from defendant any information respecting the non-payment of said charges aforesaid by said Jerome [fol. 107] Distributing Co., Inc. and said defendant, relying upon the statement of said Jerome Distributing Co., Inc. that said charges had been paid, and the receipt by it of said freight bills upon which said plaintiff had endorsed its receipt of all of said charges, and having no information that said charges had not been paid, during December, 1933, made said settlement with said Jerome Distributing Co., Inc. as aforesaid.

XV

Prior to the month of May, 1933, said defendant did not know and had not been informed either by said plaintiff or any other person or corporation, that said plaintiff was claiming that any of said lawful freight, refrigeration and demurrage charges for the transportation, handling and delivery of said carloads of grapes had not been paid, or that said defendant was liable therefor, or any part thereof,

or that it had any claim against said defendant for said charges or any part thereof.

XVI

After the close of said shipping season of 1932 and prior to May, 1933, said defendant made certain claims for damages against said plaintiff based upon the negligence of said plaintiff and its connecting carriers in transporting goods and merchandise for defendant over the lines of said plaintiff and its connecting carriers, which claims were received, acted upon and in some instances paid without any claim being made by said plaintiff against said defendant for said transportation charges, or any part thereof, referred to in plaintiff's amended complaint.

[fol. 108]

XVII

Upon and according to the information and belief of defendant, prior to the time said defendant was informed that any of said transportation charges had not been paid by said Jerome Distributing Co., Inc., or that said plaintiff was asserting any liability against said defendant for said charges, or any part thereof, said Jerome Distributing Co., Inc. had become insolvent, and thereafter said defendant was precluded from recovering and could not recover said transportation charges, or any part thereof, from said Jerome Distributing Co., Inc. excepting said sum of $790.00.

XVIII

If, at or about said 28th day of October, 1932, said defendant had been advised by said plaintiff, or by any other person, that said Jerome Distributing Co., Inc. had not paid said lawful freight, refrigeration and demurrage charges upon said carloads of grapes referred to and described in Counts 2 and 11 of said amended complaint, said defendant would have refused to permit the delivery to said Jerome Distributing Co., Inc. of any additional carloads of grapes unless said charges had been paid in full and provision made for the payment upon delivery of all of said charges payable to plaintiff upon said carloads of grapes referred to in plaintiff's amended complaint which were thereafter delivered by said plaintiff to said Jerome Distributing Co., Inc.

Said settlement of said account of said Jerome Distribut-
[fol. 109] ing Co., Inc., would not have been made by said defendant if prior thereto said defendant had been advised and notified that said charges upon any of said carloads of grapes referred to and described in plaintiff's amended complaint, or any of the counts thereof, had not been paid by said Jerome Distributing Co., Inc,, or that said plaintiff was asserting or claiming that defendant was liable for said charges, or any part thereof.

XIX

By reason of the facts herein in this further, separate and fourth affirmative defense to plaintiff's amended complaint, said plaintiff should be and is estopped from making any claim against this defendant because of said freight, refrigeration and demurrage charges for the transportation, handling and delivery of any of said carloads of grapes described in plaintiff's amended complaint and in each and every of the counts therein contained, other than and excepting to the extent of said sum of $790.00.

And as a further, separate and Fifth affirmative defense to Counts 1, 2, 3, 4 and 5, and each of them, contained in plaintiff's amended complaint said defendant alleges:

I

At the time of the issuance and delivery to said defendant of each of said bills of lading referred to in Counts 1, 2, 3, 4 and 5 of plaintiff's amended complaint there was endorsed upon the face of each of said bills of lading a certain agreement signed by said defendant as consignor of the carload [fol. 110] of grapes referred to in each of said counts of said amended complaint, which agreement was and is in the words and figures following:

"Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

Mid-State Horticultural Co.
(Signature of Consignor.)"

Thereafter upon the order of said defendant, each of said carloads of grapes referred to in said Counts 1, 2, 3, 4 and 5 of plaintiff's amended complaint was diverted to Jerome Distributing Co., Inc. a corporation, as consignee, at Manhattan Produce Yards, New Jersey, and was thereafter delivered to said Jerome Distributing Co., Inc., by said plaintiff as alleged in said counts of said amended complaint.

Wherefore, defendant prays that plaintiff take nothing by its action and that it have and recover judgment for its costs of suit.

Dated: January 22nd, 1941.

Kellas & Lamberson, Sullivan, Roche & Johnson,
Attorneys for Defendant.

[fol. 111] [File endorsement omitted.]

Duly sworn to by Arpaxat Setrakian. Jurat omitted in printing.

[fol. 112] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

DEMURRER TO DEFENDANT'S AMENDED ANSWER TO AMENDED COMPLAINT—Filed February 14, 1941

Comes now the plaintiff and demurs to defendant's amended answer to the amended complaint upon the following grounds:

I

That the further, separate and fourth affirmative defense to each and every count in plaintiff's amended complaint does not state facts sufficient to constitute a defense to plaintiff's amended complaint or to any count or cause of action contained in plaintiff's amended complaint.

WHEREFORE, plaintiff prays that this demurrer be sustained as to said affirmative defense.

W. H. Stammer, Attorney for Plaintiff.

Due service of the foregoing Demurrer, by copy, this 14th day of February, 1941, is hereby admitted.

Kellas & Lamberson, Sullivan, Roche & Johnson, by Richard Z. Lamberson, Attorneys for Defendant.

[fol. 113] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S DEMURRER TO DEFENDANT'S AMENDED ANSWER TO AMENDED COMPLAINT—Filed February 14, 1941

Estoppel is not a defense to an action for the recovery of freight charges against a person liable therefor.

Pittsburg R.R. v. *Fink*, 250 U.S. 577, 63 L. ed. 1151.

New York Central R.R. v. *York Co.*, 256 U.S. 406.

Louisville Ry. Co. v. *Central Iron Co.*, 265 U.S. 59, 44 S.C. 441.

New York Central R.R. v. *Buck*, 2 Cal. (2d) 384.

Houston R.R. Co. v. *Johnson*, 41 S.W. (2d) 14.

New York Central R.R. v. *Philadelphia Coal Co.*, 121 N.E. 581.

Respectfully submitted,
W. H. Stammer, Attorney for Plaintiff.

Due service of the foregoing Points and Authorities, by copy, this 14th day of February, 1941, is hereby admitted.

[File endorsement omitted]

Kellas & Lamberson, Sullivan, Roche & Johnson, by Richard Z. Lamberson, Attorneys for Defendant.

[fol. 114] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

NOTICE OF MOTION TO STRIKE OUT PORTIONS OF DEFENDANT'S AMENDED ANSWER TO AMENDED COMPLAINT—

Filed February 14, 1941

To the Defendant above named and to KELLAS & LAMBERSON and SULLIVAN, ROCHE & JOHNSON, its attorneys:

You, and each of you, will please take notice that on Thursday, the 20th day of February, 1941, at the hour of 10:00 o'clock A.M. of said day, in the court-room of Depart-

ment Three of the above entitled Court, in the Court House in the City of Fresno, County of Fresno, State of California, plaintiff will move the above entitled Court for its order striking out of defendant's amended answer to plaintiff's amended complaint each and all of the following portions thereof, to-wit:

I

All of the further, separate and fourth affirmative defense to plaintiff's amended complaint appearing in said amended answer, commencing at line 28 on page 21 and ending on line 25 of page 32.

II

(1) All of paragraph I of the further, separate and [fol. 115] fourth affirmative defense, appearing at page 22 of said amended answer from lines 4 to 15.

(2) All of paragraph II of said further, separate and fourth affirmative defense, commencing at line 17 on page 22 of said amended answer and ending at line 18 on page 23.

(3) All of paragraph III of said further, separate and fourth affirmative defense, commencing at line 20 on page 23 of said amended answer and ending at line 2 on page 25.

(4) All of paragraph IV of said further, separate and fourth affirmative defense, commencing at line 4 on page 25 of said amended answer and ending at line 2 on page 26.

(5) All of paragraph V of said further, separate and fourth affirmative defense, commencing at line 4 on page 26 of said amended answer and ending at line 14 on said page 26.

(6) All of paragraph VI of said further, separate and fourth affirmative defense, appearing at page 26 of said amended answer from lines 16 to 27.

(7) All of paragraph VII of said further, separate and fourth affirmative defense, commencing at line 29 on page 26 of said amended answer and ending at line 6 on page 27.

(8) All of paragraph VIII of said further, separate and fourth affirmative defense, appearing at page 27 of said amended answer from lines 8 to 21.

(9) All of paragraph IX of said further, separate and fourth affirmative defense, commencing at line 23 on page 27 of said amended answer and ending at line 1 on page 28.

(10) All of paragraph X of said further, separate and [fol. 116] fourth affirmative defense, appearing at page 28 of said amended answer from lines 3 to 24.

(11) All of paragraph XI of said further, separate and fourth affirmative defense, commencing at line 26 on page 28 of said amended answer and ending at line 8 on page 29.

(12) All of paragraph XII of said further, separate and fourth affirmative defense, appearing at page 29 of said amended answer from lines 10 to 29.

(13) All of paragraph XIII of said further, separate and fourth affirmative defense, commencing at line 31 on page 29 of said amended answer and ending at line 13 on page 30.

(14) All of paragraph XIV of said further, separate and fourth affirmative defense, appearing at page 30 of said amended answer from lines 15 to 24.

(15) All of paragraph XV of said further, separate and fourth affirmative defense, commencing at line 26 on page 30 of said amended answer and ending at line 2 on page 31.

(16) All of paragraph XVI of said further, separate and fourth affirmative defense, appearing at page 31 of said amended answer from lines 4 to 13.

(17) All of paragraph XVII of said further, separate and fourth affirmative defense, appearing at page 31 of said amended answer from lines 15 to 24.

(18) All of paragraph XVIII of said further, separate and fourth affirmative defense, commencing at line 26 on page 31 of said amended answer and ending at line 14 on page 32.

(19) All of paragraph XIX of said further, separate [fol. 117] and fourth affirmative defense, appearing at page 32 of said amended answer from lines 17 to 25.

Said motion will be made upon the ground that each and all of said portions of said amended answer are sham and irrelevant and redundant.

Said motion will be based upon this notice of notion, the points and authorities filed in support thereof, and the records and files in the above entitled action.

Dated: February 14th, 1941.

W. H. Stammer, Attorney for Plaintiff.

Due service of the foregoing Notice, by copy, this 14th day of February, 1941, is hereby admitted.

Kellas & Lamberson, Sullivan, Roche & Johnson, by Richard Z. Lamberson, Attorneys for Defendant.

[fol. 118] In Superior Court of the State of California, in and for the County of Fresno.

[Title omitted]

Points and Authorities in Support of Motion to Strike Out Portions of Defendant's Amended Answer to Amended Complaint—Filed Feb. 14, 1941.

Sham and irrelevant answers, and irrelevant and redundant matter may be stricken from a pleading.

Code of Civil Procedure, Section 453.

Estoppel is not a defense to an action for the recovery of freight charges against a person liable therefor.

Pittsburg R. R. v. *Fink*, 250 U. S. 577, 63 L. ed. 1151.

New York Central R.R. v. *York Co.*, 256 U. S. 406.

Louisville Ry. Co. v. *Central Iron Co.*, 265 U. S. 59, 44 S. C. 441.

New York Central R.R. v. *Buck*, 2 Cal. (2d) 384.

Houston R.R. Co. v. *Johnson*, 41 S. W. (2d) 14.

New York Central R.R. v. *Philadelphia Coal Co.*, 121 N. E. 581.

Respectfully submitted,

W. H. Stammer, Attorney for Plaintiff.

[fol. 119] Due service of the foregoing Points and Authorities, by copy, this 14th day of February, 1941, is hereby admitted.

Kellas & Lamberson, Sullivan Roche & Johnson, by Richard Z. Lamberson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 120] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO.

[Title omitted]

ORDER ON DEMURRER AND MOTION TO STRIKE—Filed Feb. 20, 1941

It is ordered that the demurrer of the plaintiff to the fourth defense of the Amended Answer of the defendant be and it is hereby sustained and the Motion to Strike granted.

[fol. 121] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO.

[Title omitted]

FINDINGS OF FACT AND CONCLUSINS OF LAW—Filed May 14, 1941

The above entitled action came on regularly for trial on the 20th day of February, 1941, before the Court sitting without a jury, a jury having been waived, W. H. Stammer, Esq., and Galen McKnight, Esq., appearing as attorneys for the plaintiff and Theodore J. Roche, Esq., of Sullivan, Roche & Johnson and Edward L. Kellas, Esq., of Kellas & Lamberson appearing as attorneys for the defendant; and the evidence and proofs of the respective parties having been heard and duly considered; and the action having been submitted to the Court for its decision, the Court now finds the facts in this case to be as follows:

I

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the first cause of action in plaintiff's First Amended Complaint are true.

II

Each and all of the allegations in paragraphs I, II, III, [fol. 122] IV, V, VI, VII, VIII, IX and X of the second cause of action in plaintiff's First Amended Complaint are true.

III

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the third cause of action in plaintiff's First Amended Complaint are true.

IV

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the fourth cause of action in plaintiff's First Amended Complaint are true.

V

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the fifth cause of action in plaintiff's First Amended Complaint are true.

VI

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the sixth cause of action in plaintiff's First Amended Complaint are true.

VII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the seventh cause of action in plaintiff's First Amended Complaint are true.

VIII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the eighth cause of action in plaintiff's First Amended Complaint are true.

IX

[fol. 123] Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the ninth cause of action in plaintiff's First Amended Complaint are true.

X

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the tenth cause of action in plaintiff's First Amended Complaint are true.

XI

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the eleventh cause of action in plaintiff's First Amended Complaint are true.

XII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the twelfth cause of action in plaintiff's First Amended Complaint are true.

XIII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the thirteenth cause of action in plaintiff's First Amended Complaint are true.

XIV

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the fourteenth cause of action in plaintiff's First Amended Complaint are true.

XV

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the fifteenth cause of action in plaintiff's First Amended Complaint are true.

[fol. 124]

XVI

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the sixteenth cause of action in plaintiff's First Amended Complaint are true.

XVII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the seventeenth cause of action in plaintiff's First Amended Complaint are true.

XVIII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the eighteenth cause of action in plaintiff's First Amended Complaint are true.

XIX

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the nineteenth cause of action in plaintiff's First Amended Complaint are true.

XX

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the twentieth cause of action in plaintiff's First Amended Complaint are true.

XXI

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the twenty-first cause of action in plaintiff's First Amended Complaint are true.

XXII

Said Jerome Distributing Co., Inc., was not a factor nor charged with the duty of paying all freight charges at [fol. 125] tendant to the shipment of said carloads of grapes described in the first six causes of action in plaintiff's First Amended Complaint before accepting delivery thereof from the plaintiff carrier, and plaintiff had no knowledge that said Jerome Distributing Co., Inc., was a factor or charged with such duty.

XXIII

The agreement a copy of which is attached to plaintiff's First Amended Complaint and marked Exhibit "C" is not contrary to any law or statute of the United States of America, and is not void or of no force or effect.

XXIV

Plaintiff's First Amended Complaint, and each count thereof, states facts sufficient to constitute a cause of action against the defendant.

XXV

Neither plaintiff's First Amended Complaint nor any count or cause of action therein contained is barred by the provisions of Paragraph 3, Section 16, of the Interstate Commerce Act of the United States of America as amended.

XXVI

This Court has jurisdiction of the subject matter of plaintiff's First Amended Complaint and of each and every count or cause of action therein set forth.

XXVII

Each and all the allegations in paragraph I of the further, separate and fifth affirmative defense to counts 1, 2, 3, 4

and 5 in plaintiff's First Amended Complaint appearing [fol. 126] in defendant's Amended Answer to Amended Complaint are true.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds that the plaintiff is entitled to a judgment against the defendant for the sum of $13,678.86, together with interest at the rate of 7% per annum on the sum of $1,388.06 from the 28th day of October, 1932, on the sum of $2,564.02 from the 1st day of November, 1932, on the sum of $617.58 from the 2nd day of November, 1932, on the sum of $619.63 from the 9th day of November, 1932, on the sum of $579.03 from the 17th day of November, 1932, on the sum of $5,374.94 from the 18th day of November, 1932, on the sum of $695.51 from the 19th day of November, 1932, on the sum of $1,250.76 from the 21st day of November, 1932, and on the sum of $589.38 from the 22nd day of November, 1932; and for plaintiff's costs of suit herein.

Let judgment be entered accordingly.

Dated: May 14, 1941.

H. Z. Austin, Judge of said Superior Court.

[File endorsement omitted.]

[fol. 127] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

No. 54060. Dept. 3

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

MID-STATE HORTICULTURAL CO., INC., a Corporation, Defendant

JUDGMENT—Filed May 14, 1941

The above entitled action came on regularly for trial on the 20th day of February, 1941, before the Court sitting without a jury, a jury having been waived. W. H. Stammer, Esq., and Galen McKnight, Esq., appearing as attorneys

for the plaintiff and Theodore J. Roche, Esq., of Sullivan, Roche & Johnson and Edward L. Kellas, Esq., of Kellas & Lamberson appearing as attorneys for the defendant; and the evidence and proofs of the respective parties having been heard and duly considered; and the case having been submitted to the Court for its decision; and the Court having filed herein its findings of fact and conclusions of law, awarding judgment to the plaintiff:

Wherefore, It Is Ordered, Adjudged And Decreed that the plaintiff, The Pennsylvania Railroad Company, do have and recover of and from the defendant, Mid-State Horticultural Co., Inc., the sum of $21,822.86 and plaintiff's costs of suit herein, taxed at $

Dated: May 14, 1941.

[fol. 128] H. Z. Austin, Judge of said Superior Court

Entered in Judgment-Book
No. 88 At Page 434.
This 14 Day of May 1941.

[File endorsement omitted.]

[fol. 129] In Superior Court of the State of California, in and for the County of Fresno

[Title omitted]

Notice of Appeal—Filed May 22, 1941

To the Clerk of the above entitled Court:

You Will Please Take Notice that the Mid-State Horticultural Co., Inc., a corporation, the defendant in the above entitled action, hereby appeals to the Supreme Court of the State of California from that certain judgment given and made by the above entitled court in the foregoing action on the 14th day of May, 1941, in favor of the foregoing plaintiff and against said defendant, which judgment was thereafter entered on the 14th day of May, 1941, in Book 88 of Judgments, at page 434 thereof, and from the whole thereof.

Dated this 22nd day of May, 1941.

[fol. 130] Sullivan, Roche & Johnson, Kellas & Lamberson, Attorneys for said Defendant.

[File endorsement omitted.]

[fol. 131] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

NOTICE TO CLERK TO PREPARE PAPERS FOR RECORD ON APPEAL PURSUANT TO SECTION 953-a OF THE CODE OF CIVIL PROCEDURE

Filed May 22, 1941

To the Clerk of the above entitled Court:

You Are Hereby Notified that Mid-State Horticultural Co., Inc., a corporation, the defendant in the above entitled action, has appealed from the judgment given, made and entered in the foregoing action in favor of plaintiff and against said defendant and from the whole of said judgment, and said defendant hereby requests that a transcript of all testimony offered or taken upon the trial of said action, all evidence offered or received upon said trial, and all rulings, acts or statements of the court upon said trial, also [fol. 132] all objections or exceptions of counsel upon said trial and all matters to which the same relate be made up and prepared and that a transcript of the phonographic report of the trial of said action, including therein copies of all papers, documents and writings offered or received in evidence, be made up and prepared; and

You Are Hereby Notified that the above named defendant desires to have all of the foregoing papers, records, files and pleadings on file in the above entitled action incorporated in said transcript, to-wit: complaint, amended complaint, amended answer to amended complaint, demurrer to amended answer to amended complaint, motion to strike out portion of amended answer to amended complaint, minute orders relating to overruling and sustaining of demurrer to amended answer to amended complaint and granting of motion to strike out portions of amended answer to amended complaint, findings of fact and conclusions of law, judgment, notice of appeal, notice to clerk to prepare papers and records on appeal under section 953-a of the Code of Civil Procedure, and all other papers making up the judgment roll of said court in said action.

Said defendant has personally arranged with the reporter for his compensation herein.

Dated: May 22, 1941.

Sullivan, Roche & Johnson, Kellas & Lamberson.
Attorneys for Defendant.

[File endorsement omitted]

[fol. 133] In Superior Court of the State of California, in and for the County of Fresno

[Title omitted]

Stipulating Providing for Omission from Record on Appeal of Certain Exhibits—Filed May 26, 1941

It Is Hereby Stipulated that the following matters may be omitted from the transcript of the record on appeal to be prepared and filed pursuant to provisions of section 953(a) of the Code of Civil Procedure of the State of California, viz.,

1. Exhibits "D", "F", "H", "J", "L", "N", "O", "P", "Q", "R", "S", "T", "U", "V", "W", "X", "Y", "Z", "1" and "2" attached to and made a part of plaintiff's amended complaint.

2. Exhibits "E", "G", "I", "K", and "M" attached to and made a part of plaintiffs amended complaint.

It Is Further Stipulated that the bill of lading, a copy [fol. 134] of which is attached to plaintiffs amended complaint on file herein and therein marked Exhibit "A", which is to form a part of the record on appeal herein, is identical in all respects with the exhibits hereinabove referred to in Paragraph 1 of this stipulation, excepting

(a) as to the description of the commodities covered by such bill of lading, date and place of delivery thereof to Atchison, Topeka & Santa Fe Railway Company, date of shipment and place of diversion, all of which, with respect to each shipment, are covered by the allegations of said amended complaint.

(b) that the reference to section 7 of conditions of the shipment appearing upon the face of each of said bills of lading was signed by said defendant, as consignor, only upon exhibits "A", "D", "F", "H", and "J" and upon no others.

It Is Further Stipulated that a special notice identical in form to Exhibit "B" attached to and made a part of said amended complaint, signed by Jerome Distributing Company, Inc., which is to form a part of said record on appeal, was delivered to plaintiff in accord with the allegations of Counts One to Six inclusive of said amended complaint. Said special notice was so signed and delivered only with

reference to the said first six counts contained in plaintiff's amended complaint.

It Is Further Stipulated that either of the parties to said action may at any time make any of said omitted exhibits a part of the record on said appeal.

[fol. 135] This stipulation shall be copied into the Clerk's Transcript of the record on appeal in said action.

Dated: May 23, 1941.

W. H. Stammer, Galen McKnight, Attorneys for Plaintiff, Sullivan, Roche & Johnson, Kellas & Lamberson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 136-137] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 138] In Superior Court of the State of California, in and for the County of Fresno

Honorable H. Z. Austin, Judge

No. 54060

The Pennsylvania Railroad Company, a Corporation, Plaintiff,

vs.

Mid-State Horticultural Co., Inc., a Corporation, Defendant

Statement of Evidence—Filed June 16, 1941

Fresno, California, February 20, 1941.

The above entitled action came on regularly for trial on February 20, 1941 in Department Three of the Superior Court of the State of California, in and for the County of Fresno, Honorable H. Z. Austin presiding. The plaintiff was represented by W. H. Stammer, Esq. and Galen McKnight, Esq., and the defendant was represented by Sullivan, Roche and Johnson, by Theodore J. Roche, Esq., and Messrs. Kellas and Lamberson. The following proceedings were had and testimony taken, to wit:

COLLOQUY

THE COURT: Plaintiff ready?

MR. STAMMER: Plaintiff is ready, your Honor.

THE COURT: Defendant ready?

[fol. 139] Mr. Roche: Ready, your Honor.

Mr. Stammer: May it please the Court, the defendant filed by leave of court an amended answer to the amended complaint. The plaintiff has filed a general demurrer to the fourth affirmative defense in the amended answer, which is the defense of estoppel. The plaintiff has also filed a notice of motion to strike out the fourth defense in the amended answer and each and all of the paragraphs thereof. The matter has heretofore been submitted to the Court on a previous law and motion argument, and the plaintiff, unless the Court requires argument, will submit both the demurrer to the fourth separate defense, and the motion to strike out the fourth separate defense, and each of its paragraphs, upon the points and authorities filed in support of the demurrer and the motion to strike; the position of the plaintiff being that the fourth defense is a defense based upon a claimed esfoppel, which, in turn, rests upon certain conduct of the carrier occurring during and after the carriage of the particular products involved in the plaintiff's amended complaint. The position of the plaintiff is that estoppel is not available as a defense to the collection of the lawful freight, refrigeration and demurrage charges which are claimed in the complaint.

Mr. Roche: Your Honor will recall that during the argument on the motion for leave to file an amended answer, we informed your Honor that if the order was made, in order that no delay should result in the trial of this case, we [fol. 140] would submit without argument, or, more properly speaking, the arguments heretofore made to any demurrer that might be filed, to any part of that answer, and likewise, any motion to strike that might be interposed either to the answer itself, or any portion of that answer. Of course, we are not in accord with the position taken by the plaintiff with respect to the merits either of the motion to strike or the demurrer, but in conformity with the promise which we then made to the Court, we are perfectly willing to submit both these matters upon the argument made some months ago. It occurs to me, however, if your Honor intends to grant the motion to strike, that there

would not be any necessity of disposing of the demurrer. If, on the other hand, your Honor contemplates sustaining that demurrer, there might not be any necessity of their insisting upon the motion to strike. If the motion is granted there would not be anything before the Court upon which the demurrer could fasten itself.

The Court: It occurs to the Court that perhaps the ruling had better be made on the motion to strike.

Mr. Stammer: Well, if the Court please, while both of these proceedings are based upon the same points of law, I think it is perfectly in order for the Court to sustain the general demurrer and then to grant the motion to strike out the particular defense that I have referred to. I'd prefer to have it that way so there would be a ruling on both procedures.

[fol. 141] The Court: The demurrer to the fourth defense —fourth defense in the answer, is sustained, and the motion to strike is granted.

Mr. Stammer: Well, if the Court please, the causes of action in the amended complaint are all based upon the shipment of certain cars of grapes in Interstate Commerce and each cause of action is a cause of action for the recovery of the freight, refrigeration and demurrage charges fixed by the tariffs, published and filed with the Interstate Commerce Commission, pursuant to the provisions of the Interstate Commerce Act. The allegations of the complaint are all admitted with the single exception of the allegation that the sum claimed in each cause of action is now due, owing and unpaid from the defendant to the plaintiff, together with interest thereon at the rate of 7 per cent per annum, from the date of delivery of shipment. That particular allegation is denied. I think it is admitted that a demand was made on the defendant for payment of freight charges, and that the defendant refused to pay. Another defense raised by the answer, which is a defense, as I see it, of law, entirely, namely, that the agreement entered into between plaintiff and defendant, which had for its effect a waiver of the time provisions of the Interstate Commerce Act, which is claimed by the defendant to be invalid and void. Therefore, in presenting evidence, the plaintiff will present evidence only upon the single denial by the defendant that the amount of freight payments due and unpaid, in each cause [fol. 142] of action, from the defendant to the plaintiff—By the way, if the Court please, before the introduction of evi-

dence, I'd like to associate Mr. Galen McKnight as attorney for the plaintiff.

The Court: Very good. The Clerk will make the proper order.

Mr. Stammer: Now, in the file is the original deposition, your Honor, taken in the East of several witnesses for the plaintiff——

The Court: All right.

Mr. Stammer: The plaintiff, now, your Honor, desires to read in evidence the direct examination of the witness John Savage, Jr., taken in a deposition before William H. Vogt, a notary public in and for the County of New York, New York State, on September 7, 1939.

Mr. Roche: I was going to suggest, Mr. Stammer, if you have a copy of the deposition, it might be advisable to permit the Court to follow the original, because there are certain exhibits attached to the original deposition which it might be advisable for his Honor to read, as the deposition proceeds. We haven't any objection to your using a copy, Mr. Stammer.

Mr. Stammer: Thank you, Mr. Roche. Direct Examination of Mr. John Savage, Jr., from the deposition. (Reading:)

"Q. Where do you reside?

"A. Kromer Avenue, Berwyn, Pennsylvania.

"Q. By whom are you employed?

"A. By the Pennsylvania Railroad Company in the office [fol. 143] of the Treasurer, Broad Street Station Building, Philadelphia, Pa.

"Q. How long have you been employed by The Pennsylvania Railroad Company?

"A. 41 years.

"Q. What is your present position in the office of the Treasurer?

"A. Chief Clerk in charge of credits and collections.

"Q. How long have you occupied that position?

"A. Since January 1, 1919.

"Q. What are your duties in that position?

"A. Among other things, to supervise the collection of bills and moneys due The Pennsylvania Railroad Company.

"Q. Generally speaking, have your duties been the same since January 1, 1919?

"A. Yes.

"Q. What were your duties in November, 1932?

"A. They were the same.

"Q. Can you describe, Mr. Savage, a little more fully what your duties were in connection with the collection of bills or money due the Pennsylvania Railroad?

"A. Of course. Among other things, with respect to the supervision of the collection of bills and moneys due the railroad company, I ascertain instances in which the Pennsylvania Railroad has not received, in whole or in part, transportation charges on shipments delivered by it at destination.

"Q. Mr. Savage, I refer to a certain shipment made October 7, 1932 from Conejo, California, in car SFRD 17404 delivered by The Pennsylvania Railroad Company to Je- [fol. 144] rome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. The Pennsylvania Railroad Company never received any amount whatsoever of these transportation charges.

"Q. What is the amount of the charges due upon the shipment to which I have just referred?

"A. $695.51.

"Q. I refer to a certain shipment made October 6, 1932 from Conejo, California, in car SFRD 22471, also delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. The Pennsylvania Railroad Company never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due on that shipment?

"A. $698.33.

"Q. I refer to a certain shipment made October 22, 1932 from Cooperage Spur, Fresno, California, in car PFE 13520, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania [fol. 145] Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. The Pennsylvania Railroad never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due on that shipment?

"A. $617.58.

"Q. I refer to a certain shipment made October 22, 1932 from Cooperage Spur, Fresno, California, in car PFE 71996, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due on that shipment?

"A. $619.18.

"Q. I refer to a certain shipment made October 22, 1932 from Hew House, California, in car SFRD 18007, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges upon that ship-
[fol. 146] ment.

"Q. What is the amount of charges due on that shipment?

"A. $621.58.

"Q. I refer to a certain shipment made October 9, 1932 from Quality, California, in car PFE 28824, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $667.33.

"Q. I refer to a certain shipment made October 8, 1932 from Quality, California, in car PFE 36495, delivered by The Pennsylvania Railroad Company to Jerome Distrib-

uting Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $687.73.

[fol. 147] "Q. I refer to a certain shipment made October 8, 1932 from Quality, California, in car PFE 24375, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $683.83.

"Q. I recer to a certain shipment made October 22, 1932 from Quality, California, in car PFE 1478, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $660.43.

"Q. I refer to a certain shipment made October 29, 1932, from Quality, California, in car PFE 71971, delivered by The Pennsylvania Railroad Company to Jerome Distrib-
[fol. 148] uting Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $589.38.

"Q. I refer to a certain shipment made October 6, 1932 from Quality, California, in car PFE 36105, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $689.73.

"Q. I refer to a certain shipment made October 22, 1932 from Quality, California, in car PFE 14745, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation [fol. 149] charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $662.83

"Q. I refer to a certain shipment made October 7, 1932 from Quality, California, in car PFE 13607, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $670.33.

"Q. I refer to a certain shipment made October 7, 1932 from Quality, California, in car PFE 15847, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad

ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

[fol. 150] "Q. What is the amount of charges due upon that shipment?

"A. $667.13

"Q. I refer to a certain shipment made October 8, 1932 from Quality, California, in Car PFE 71402 and delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $682.63.

"Q. I refer to a certain shipment made October 27, 1932 from Quality, California, in car PFE 33599, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $638.33.

[fol. 151] "Q. I refer to a certain shipment made October 31, 1932 from Quality, California, in car PFE 71079,——"

Mr. Stammer: I might say that I think that is a transposition. It should be car No. 71097.

Mr. Roche: Well, it is so stipulated, your Honor. I noticed that in the deposition.

The Court: It is not corrected on the face of this original.

Mr. Stammer: It is not. But, reading it into evidence, if Mr. Roche is satisfied, I will read it as PFE 71097.

Mr. Roche: I am perfectly willing to submit, may it please your Honor, that the correction may be made upon the face of the deposition.

The Court: Very good.

Mr. Stammer (Continuing reading): "—delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $581.38.

"Q. I refer to a certain shipment made October 23, 1932 from Quality, California, in car PFE 14118, delivered by The Pennsylvania Railroad Company to Jerome Distrib- [fol. 152] uting Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $579.03.

"Q. I refer to a certain shipment made October 7, 1932 from Quality, California, in car PFE 16444, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $671.53.

"Q. I refer to a certain shipment made October 8, 1932 from Quality, California, in car PFE 32461, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transporta- [fol. 153] tion charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $682.43.

"Q. I refer to a certain shipment made October 26, 1932 from Quality, California, in car PFE 16386, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $619.63.

"Q. Did the Pennsylvania Railroad ever receive any checks from any one in connection with the transportation charges concerning which you have just testified?

"A. Yes, it did. It received a check November 21, 1932, drawn on the National Bank of Yorkville in New York by Jerome Distributing Company, Inc.

"Q. To whom was that check payable?

"A. It was payable to the order of The Pennsylvania Railroad Company for $10,433.46.

[fol. 154] "Q. What did the Pennsylvania Railroad do with this check?

A. The check was deposited in Chase National Bank for collection November 22, 1932.

"Q. Was that check ever paid by the National Bank of Yorkville?

A. No.

"Q. Was the check returned to the Pennsylvania Railroad?

A. The check was returned to the Pennsylvania Railroad by the Chase National Bank, one of our depositors in New York City, with the advice from the National Bank of Yorkville that it had been returned marked 'Insufficient funds'.

"Q. What did that notation mean to you?"

Mr. Roche: Counsel need not read our objections unless we insist upon it.

Mr. Stammer (continuing reading):

"A. That the depositor did not have sufficient funds in the bank to meet the check.

"Q. I show you this check and ask you whether that is the check to which you have just testified?

"A. That is the check."

Mr. Stammer: If the Court please, we will now offer in evidence the check referred to by the witness, which is attached to the deposition. It will have to be marked as an exhibit in the case anyway.

Mr. Roche: It might be best, if your Honor please, to have the Clerk mark the exhibit as it is attached to the deposition, and then avoid the necessity of taking it out, unless your [fol. 155] Honor should prefer some other procedure. We haven't any objection to the check being——

Mr. Stammer: Simply a matter of machinery, Mr. Roche, so that the Reporter can get the record in order. That is the only reason I am reading this deposition instead of introducing it. I thought perhaps the easiest thing to do would be, in each instance, to introduce the particular exhibit and have it marked so that it would just come in regular order in the court record, outside of the deposition.

Mr. Roche: That procedure is perfectly agreeable.

Mr. Stammer: My only feeling in that is that we can probably eliminate all reference to the deposition. We will offer this, then, in evidence as Plaintiff's Exhibit 1, your Honor.

The Court: Very well.

Mr. Stammer: Being a check dated November 12, 1932, No. 7701 payable to the order of Pennsylvania Railroad Company for $10,433.46, signed, Jerome Distributing Co., Inc., by J. Fichtelberg.

The Court: It is admitted. It will be marked Plaintiff's Exhibit No. 1. (A copy of Pltff's Ex. 1 at end of transcript.)

Mr. Stammer (continuing reading):

"Q. Did the Pennsylvania Railroad ever receive any other check besides the one concerning which you have just testified?

A. Yes. It received a check dated November 22, 1932 for $7,035.19 drawn by Jerome Distributing Company, Inc. on [fol. 156] the National Bank of Yorkville in New York, payable to the Pennsylvania Railroad.

"Q. When was this check received?

A. November 21, 1932.

"Q. What did the Pennsylvania Railroad do with this check?

A. It was deposited November 22, 1932 in the Chase National Bank for collection.

"Q. Was that check ever paid by the bank on which it was drawn?

A. No.

"Q. Was the check returned to you?

A. Yes, it was.

"Q. By whom was it returned?

A. It was returned by the Chase National Bank with the notation 'insufficient funds.'

"Q. I show you this check and ask you whether it is the check concerning which you have just testified?

"A. That is the check."

Mr. Stammer: We will now offer in evidence that check which was attached to the deposition and marked Plaintiff's Exhibit 2, as Plaintiff's Exhibit 2 in this action.

The Court: Admit it.

Mr. Stammer: Being check No. 7696, dated November 19, 1932, payable to the Pennsylvania Railroad Company for $9237.11, signed by Jerome Distributing Co., Inc., J. Fichtelberg.

Mr. McKnight: That is not the check, Mr. Stammer, that is number two in the deposition.

Mr. Stammer: That is right. They may—may that offer [fol. 157] be stricken out? It would be somewhat confusing at this point.

The Court: Yes.

Mr. Stammer: And I will make the offer—I will offer in evidence as Plaintiff's Exhibit 2——

The Court: Admit it.

Mr. Stammer: The check appearing in the deposition as Plaintiff's Exhibit 2, being No. 7707, dated November 22, 1932, payable to Pennsylvania Railroad Company in the sum of $7035.19, signed by Jerome Distributing Co., Inc. by J. Fichtelberg.

The Court: Admit it.

(A copy of Plaintiff's Exihibit 2 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. I show you two pieces of paper and ask you whether they constitute the notice which you received upon the return of the check for $7,035.19?

"A. Yes, they do."

Mr. Stammer: I will now offer in evidence as Plaintiff's Exhibit 3 the two notices attached to the deposition and marked Exhibit 3.

Mr. Roche: Now, we desire, may it please your Honor, to object to the introduction in evidence of the exhibit here offered, on the ground it is incompetent, irrelevant and immaterial, hearsay as against us, not binding upon us and relating to a transaction other than the transaction to [fol. 158] which the defendant in this case is a party.

Mr. Stammer: We submit it, if the Court please. It is the nonpayment by the bank of a particular check, which we offer in support of the witness's testimony.

The Court: Objection is overruled.

(A copy of Plaintiff's Exhibit 3 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. I show you a piece of paper and ask you whether that is the notice you received in connection with the check for $10,433.46, concerning which you previously testified?

A. Yes, it is."

Mr. Stammer: We now offer as Plaintiff's Exhibit 4 the notice attached to the deposition as plaintiff's exhibit 4.

Mr. Roche: Now, to that notice, may it please the court, we make the same objection.

The Court: Same objection and same ruling.

(A copy of Plaintiff's Exhibit 4 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. Did the Pennsylvania Railroad receive any other checks from the Jerome Distributing Company, Inc. at that time?

A. It received a check for $9,237.11, dated November 19, 1932 on that same day. The check was that of the Jerome Distributing Company, Inc. drawn on National Bank of Yorkville in New York and payable to the Pennsylvania Railroad.

[fol. 159] "Q. What was done by the Pennsylvania Railroad with that check?

A. That check was deposited in the Chase National Bank for collection on November 22, 1932.

"Q. Was that check ever paid by the bank on which it was drawn?

A. No.

Q. Was the check returned to you?

A. It was returned by the Chase National Bank with notation of the National Bank of Yorkville 'short'.

"Q. Now, I show you this check and ask you whether that is the check for $9,237.11 concerning which you just testified?

A. Yes, it is."

Mr. Stammer: The Plaintiff now offers in evidence as Plaintiff's Exhibit 5, the check attached to the deposition as exhibit 5.

The Court: Admit it.

(A copy of Plaintiff's Exhibit 5 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. Now, I show you two slips of paper clipped together and ask you whether they constitute the notification received by the Pennsylvania Railroad with respect to the disposition of the check for $9,237.11?

"A. Yes, they do."

Mr. Stammer: We will now offer in evidence as Plaintiff's Exhibit 6 the two notices attached to the deposition as exhibit 6.

Mr. Roche: Now, to that offer we make the same objection, [fol. 160] your Honor.

The Court: Same ruling. Objection overruled.

(A copy of Plaintiff's Exhibit 6 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. Referring to the three checks, Plaintiff's Exhibits 1, 2, and 5, will you tell me whether they were delivered by the Jerome Distributing Company, Inc. to the Pennsylvania Railroad in connection with the transportation charges on any of the shipments concerning which you previously testified?

"A. These checks purported to be in payment of those charges and other charges on various shipments.

"Q. Can you tell me which of the shipments concerning which you testified previously were covered by the check for $10,433.46, plaintiff's Exhibit 1?

A. Yes.

"Q. Will you tell that?

A. The charges on PFE 36495, $687.73; PFE 24375, $683.83; PFE 13607, $670.33; PFE 71402, $682.63; PFE 35599, $638.33; PFE 14118, $579.03; PFE 32461, $682.43; PFE 16386, $619.63; and PFE 15847, an amount of $665.13. The charges on this car amounted to $667.13 and the balance of $2 was included in the check for $7,035.19. Also PFE 16444, an amount of $2. The balance on this car, of $669.53, was included in the check fo- $7,035.19.

"Q. Can you tell me whether the charges on any of the shipments concerning which you previously testified were [fol. 161] covered by the check for $7,035.19, plaintiff's Exhibit 2?

A. Yes.

"Q. What charges were covered by that check?

"A. The charges on SFRD 17404, $695.51; PFE 28824, $667.33; PFE 71971, $589.38; PFE 71097, $581.38; PFE 15847, $2—the balance of $665.13 outstanding on this car was included in the check for $10,433.46, concerning which I previously testified; PFE 16444, $669.53—the balance of charges of $2 outstanding on this car was included in the check for $10,433.46 as heretofore testified.

"Q. Can you tell me whether the charges outstanding on any of the shipments concerning which you initially testified were covered by the check for $9,237.11; plaintiff's Exhibit 5?

A. Yes. The charges on RD 22471, $698.33; PFE 13520, $617.58; PFE 71996; $619.18; SFRD 18007, $621.58; PFE 1478, $660.43; PFE 36105, $689.73; and PFE 14745, $662.83.

"Q. At the time these checks were tendered to the Pennsylvania Railroad did the railroad give any receipt to Jerome Distributing Company, Inc.?

"A. The Pennsylvania Railroad gave Jerome Distributing Company, Inc. a receipted freight bill in connection with each shipment covered by these charges.

"Q. Under what circumstances were these receipts given?

"A. Subject to collection.

[fol. 162] "Q. What do you mean when you say 'subject to collection'?

"A. I mean subject to the honoring and payment of the checks on the banks on which they were drawn.

"Q. Do I understand that the receipts were given merely in anticipation that the checks would be honored?"

Mr. Roche. Just a minute, your Honor. We object to that question upon the ground it is incompetent, irrelevant and immaterial.

Mr. Stammer. If the Court please—pardon me. Go ahead. I did not mean to interrupt.

Mr. Roche: I notice the objection here, and in addition to those that are stipulated here, that if is not the best evidence, I am going to cover that objection, but the real objection would be this one that is not reserved, that it calls for the conclusion of the witness.

The Court: Well, I suppose——

Mr. Stammer: If the Court please, so far as the last objection is concerned, I assume it would not be available, because it would be a mere objection to the form of the question. However, so far as the evidence, itself, is concerned, this is evidence of the manner in which the check was received by the Pennsylvania Railroad Company, which I think it material. This particular man was the man in the Treasurer's office, in charge of the collections and receipt of payments. He is the only person that could testify for the Pennsylvania Railroad Company the manner [fol. 163] in which they received the checks and the intent with which it was received.

The Court: Wouldn't they be bound by the receipt and the circumstances attending this transaction?

Mr. Stammer: Not at all, your Honor, for two reasons. In the first place, the acceptance of the check is never payment unless there is an express agreement to that effect, and that the giving and receiving of the check, and the giving of a receipt therefor are not sufficient to show payment. In other words, a check which is received in the ordinary course of business, in law, is received subject to its payment and collection. There is another reason for that rule in this particular case, namely, that the defendant, here, has an independent liability and duty to pay these freight charges, and only the actual payment of the charges could relieve him from that duty. So, this is to show by the testimony of this witness that the check was received in the ordinary course of business, subject to collection.

Mr. Roche: May I just say this, your Honor? The last suggestion made by Mr. Stammer does not go to the—does not go to the objection, itself, it goes to the effect of the evidence, if it is admitted, and the effect of the evidence as it stands at the conclusion of this case. If Mr. Stammer is correct in stating that, under those circumstances, can transportation charges made by a common carrier, which is under the jurisdiction of the Interstate Commerce Com- [fol. 164] mission, constitute a payment of those charges? Of course, that is a legal proposition, and properly should be addressed to your Honor at the conclusion of this case. Even though Mr. Stammer is correct in that statement, it would not permit testimony to come into this record which would otherwise be objectionable. There isn't any question at all, may it please the Court, respecting the principle alluded to by Mr. Stammer, that the mere giving of a check which thereafter is not paid, does not in and of itself constitute payment. There must be some understanding or some agreement that the check shall be received as payment of the obligation in satisfaction of which the check is given. But the authorities are uniform to the point that you do not have to establish that agreement by positive or direct evidence. In other words, it can be established substantially. If a man receives a check in payment of—from his debtor, in payment of an obligation due him, and he gives a receipt and makes no objection for years afterwards to the nonpayment of that check, even though there might not be an express agreement between the parties at the time the check was given and the receipt signed, nevertheless, the Court would be allowed, upon that testimony to determine that he check was, in fact, received in extinguishment of the obligation. Now here, may it please the Court, we have a situation already developed by the testimony. These checks were received, the testimony shows that receipts were given to the Jerome Distributing Company by [fol. 165] the Pennsylvania Railroad Company. That is already testified to by the witness. We submit, may it please your Honor, that the question which has just been read to your Honor is not a proper question to be addressed to a witness, considering the subject matter. I am willing to concede, too, may it please your Honor, that probably the last objection made by me does go to the form of the question, and ought not to be considered by your Honor because it was not made at the time the deposition was

taken; but we still submit the testimony is incompetent, irrelevant and immaterial.

Mr. Stammer: Well, I am not, your Honor, prepared to concede Mr. Roche's statement of the principle of law in its entirety, in view of the fact that courts have held——

Mr. Roche: May I add this to the objection, one I think your Honor should have a right to consider, although not made during the taking of the deposition, and that is, no proper foundation has been laid. In other words, may it please your Honor, it does not appear here that Mr. Savage was the particular individual connected with the railroad company to whom these checks were given, and by whom receipt or receipts were signed. Now he is undertaking to testify, may it please your Honor, with respect to an understanding, or understandings occurring between, we will say, the Jerome Distributing Company on the one side and some other official of the plaintiff, the railroad company, on the other. The question is, "'Do I understand that [fol. 166] the receipts were given merely in anticipation that the checks would be honored?" Now, that is clear, may it please the Court. No testimony has been introduced tending to show that Mr. Savage was the particular official of that company to whom the checks were delivered or by whom the freight bills were receipted.

The Court: (After argument) Isn't that an obvious conclusion?

Mr. Stammer: I don't think so, your Honor. It is my position that the proper person, the employee of the Pennsylvania Railroad in charge of these collections can state how these checks were accepted, and that is what he says, they were accepted subject to the anticipation that the checks would be honored. In other words, subject to collection.

The Court: Doesn't that occur whenever a check is given?

Mr. Roche: I can readily understand what your Honor has in mind, because I can understand, your Honor, assuming a man isn't receiving a check in satisfaction of an obligation, unless he felt the check would thereafter be paid by the bank upon which it was drawn. Nevertheless, there are controversies that come up in courts of justice where just that exact situation was involved. Now, suppose, may it please your Honor, that these checks were turned over to the railroad company covering these particular charges,

and the witness has testified these checks did cover these particular carrier charges, as well as others, and suppose [fol. 167] that it should afterwards appear, may it please your Honor, or, as it has to some extent already appeared during the taking of this deposition, that upon the receipt of those checks, these freight bills were actually receipted by the railroad company; and suppose, may it please your Honor, it should appear that for a year and a half or two years thereafter, the railroad company undertook to enforce payment of these checks as against the Jerome Distributing Company, and never at any time notified the defendant in this case, who they claim is responsible for those carrier charges, that the carrier charges had not in fact been paid. Now, it does seem to me that upon that testimony that the court might be justified, assuming that a finding of that kind could be made in a case of this character, that the court would be justified in finding from the surrounding facts and circumstances that the railroad company did actually rely upon the credit of the Jerome Distributing Company, and did accept those checks in payment of these charges; and when the checks were not paid, instead of seeking to enforce the payment of these charges against the defendant, it sought to enforce the payment of the checks against the Jerome Distributing Company, which was exactly what occurred in this particular case.

Mr. Stammer: Well, if the Court please, may I answer that first, because Mr. Roche is now injecting into the back door the principle of estoppel, which has been straightened out. I want the court to be careful of this, and distinguish [fol. 168] between those two things. This entire argument might be relevant upon a definition of estoppel, but in this particular case, and in all cases, the burden of proof of payment in the end is upon the defendant, and we are simply showing the circumstances under which the checks were given. The authorities seem to be clear that the giving of a receipt is not evidence of the express agreement which must be made in order to change the ordinary rule of law.

The Court: Aren't you asking this witness to decide that very legal question?

Mr. Stammer: No, I am asking him only what intention the Pennsylvania Railroad Company had when it accepted the check and that is what it amounts to.

The Court: Well, all right, we will overrule the objection. Objection overruled. Go ahead.

Mr. Stammer (Continuing reading):

"A. Yes.

"Q. Were these checks accepted by the Pennsylvania Railroad as payment of the particular charges which they purported to cover?"

Mr. Roche: Same objection, your Honor.

The Court: Same ruling.

Mr. Stammer (Continuing reading):

"A. These checks were not accepted by the railroad as payment.

"Q. How then did the Pennsylvania Railroad accept these checks?"

[fol. 169] Mr. Roche: Same objection, your Honor.

The Court: Same ruling.

Mr. Stammer (Continuing reading):

"A. Subject to the collection and payment of the checks.

"Q. Under what circumstances would the Pennsylvania Railroad have regarded itself itself as having been paid these charges?"

Mr. Roche: We make the same objection, your Honor, to that question. Your Honor will observe that during the taking of the deposition itself, in addition to the general objection, the objection that it is not binding upon the defendant and calls for a conclusion was expressly made, and we certainly insist, may it please the Court, that the question does call for a conclusion of the witness, aside from the objections made.

The Court: I am inclined to think that is correct. Objection is sustained.

Mr. Stammer: (Continuing reading).

"Q. Now, finally, has the Pennsylvania Railroad received from any source whatsoever payment of the charges concerning which you have previously testified?"

Mr. Roche: Same objection.

The Court: Same ruling. It is already in evidence.

Mr. Stammer: Pardon me?

The Court: It is already in evidence. Objection is sustained.

[fol. 170] Mr. Roche: Now, I will read your Honor the cross-examination of this witness, which was conducted by Mr. Silverman, of New York. (Reading):

"Q. Mr. Savage, have you——"

The Court: (Interrupting.) What page is that?

Mr. Roche: Page 17, near the bottom of the page.

The Court: All right.

Mr. Roche: (Reading) "Q. Mr. Savage, have you all the records of the railroad company with you regarding the shipment of the twenty-one carloads of merchandise mentioned in the complaint?

"A. Yes, I believe we have all the papers relating to each shipment and its delivery.

"Q. Have you the records of all business transacted between the Pennsylvania Railroad and the Jerome Distributing Company, Inc. with you?"

Mr. Stammer: To which we object on the ground that any records, outside of the ones affecting these cars would be incompetent, irrelevant and immaterial.

Mr. Roche: It is a preliminary question, your Honor.

The Court: All right.

Mr. Roche: (Continuing reading) "A. No, I have not.

"Q. Have you been testifying from memory?

"A. No.

"Q. Have you been referring to records in giving this testimony today?

"A. I have been referring to a memorandum that I prepared from the records.

[fol. 171] "Q. Have you copies of the receipted freight bills with you with reference to the twenty-one carloads?

"A. Yes.

"Q. May I see them? Mr. Savage, I show you copies of a freight bill produced by you, covering SFRD 17404 dated November 19, 1932. Upon receipt of the check of the Jerome Distributing Company, Inc. do you put a paid stamp on the bill?"

Mr. Stammer: Just a minute, Mr. Roche. For the purpose of the record, we will object to that on the ground that the mark on the freight bill "Paid" is incompetent, irrelevant and immaterial, that it is not proof of payment, nor does it prove the receipt of the freight charges by the plain-

tiff here, which would relieve the defendant of his independent obligation to pay the freight charges.

Mr. Roche: Well, it seems to me, may it please your Honor, the answer to that objection just made is that this is proper cross-examniation. Whether, when this testimony is in, it measures up to the requirements of the law, presents an entirely different situation. But your Honor will recall, and I call your Honor's attention to the upper part of page 16, that in answer to a question put by plaintiff's counsel, the witness testified the Pennsylvania Railroad gave Jerome Distributing Company, Inc. a receipted freight bill in connection with each shipment covered by these charges; and certainly it is proper cross-examination.

The Court: I think so. Objection is overruled.

[fol. 172] Mr. Roche (Continuing reading): "A. Yes.

"Q. Is that underneath the words 'Received Payment for the Company'?

"A. It is usually a rubber stamp with the agent's name on it."

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Continuing reading) "Q. And that is upon receipt of the check?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Reading) "A. Yes.

"Q. Now, Mr. Savage, you testified that a freight bill was delivered to Jerome Distributing Company, Inc. for each of the carloads of merchandise mentioned in the complaint?"

Mr. Stammer: Same objection.

The Court: Objection overruled.

Mr. Roche: (Reading) "A. That is right, yes.

"Q. Well, I understand that upon receipt of the three checks, plaintiff's Exhibits 1, 2 and 5, that each of the freight bills was stamped by the Pennsylvania Railroad 'Paid'?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Reading) "A. I have not seen the receipts but it is my impression that they were marked 'paid' or 'received payment' by the agent.

[fol. 173] "Q. The agent for the Pennsylvania Railroad? But there is no question in your mind that they were either marked 'paid' or 'received payment'?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Reading) "A. I think that is correct.

"Q. Is there anything in writing on any of the freight bills involved in this action wherein a statement is made that the receipt of the check shall only be considered payment if the check is eventually paid?"

Mr. Stammer: To which we object on the same ground.

Mr. Roche: Well, that certainly is proper cross-examination, your Honor, because the witness is being asked, may it please your Honor, for the writing upon the freight bill.

The Court: Haven't we got them here?

Mr. Roche: Pardon?

The Court: Have we got those here?

Mr. Roche: Well, the situation is this, your Honor; we have one of the freight bills, possibly two of the freight bills, but the freight bills were returned by the defendant in this case to the railroad company in connection with some claims that were not involved in this action.

The Court: All right. Objection is overruled.

Mr. Roche: (Reading) "A. Not that I am aware of.

"Q. Well, you have been with the Company for forty one years, I understand? Is that true?

"A. Yes.

"Q. Have you ever seen a similar statement in writing [fol. 174] on any of your freight bills?"

Mr. Stammer: Same objection, your Honor.

The Court: Same ruling.

Mr. Roche: (Reading) "A. No, I have not.

"Q. The, as I understand it, upon receipt of the check the freight bill is marked 'Paid' or 'Payment Received'?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Reading) "A. That's right.

"Q. You testified on direct examination that when you received a check, and when I say 'you' I mean the Pennsylvania Railroad, you did not consider it payment until the check cleared the bank, is that right?

"A. That is correct.

"Q. Is there anything in writing on any of your bills or the paid stamp you testified to, which would indicate that?"

Mr. Stammer: I want the same objection.

The Court: Yes. Same ruling.

Mr. Roche: (Reading) "A. Not that I am aware of.

"Q. Now, when you receive a check do you immediately credit the debtor with the amount of the check in your books?"

Mr. Stammer: Same objection to that, if the Court please, on the ground it is incompetent, irrelevant and immaterial, does not constitute any proof of acceptance of the check in payment, if there was such an entry.

[fol. 175] The Court: I think that is cross-examination, probably.

Mr. Roche (Reading):

"A. Yes.

"Q. Do you know when the twenty-one cars were delivered to Jerome Distributing Company?

"A. Not of my personal knowledge. The records of the Company——

"Q. Mr. Savage, the Pennsylvania Railroad does extend credit to receivers or shippers for freight charges?

"A. Yes, it does.

"Q. How long a period?

"A. The order of the Interstate Commerce Commission limits the period to 96 hours.

"Q. Does the Pennsylvania Railroad limit it to 96 hours?

"A. The great bulk of the accounts of the Pennsylvania Railroad of freight shippers settle on a 48 hour basis when that period of credit is authorized from our office.

"Q. Did the Jerome Distributing Company, Inc. have a line of credit with the Pennsylvania Railroad at the time in between October and November, 1932?

"A. Yes, it did.

"Q. And for how long a period of time did its credit extend?

"A. That credit was similar to the credit extended a perishable receiver and that is on a 48 hour basis.

"Q. How long prior to November, 1932 did Jerome Distributing Company, Inc. have a line of credit with you, approximately?

"A. Since May, 1924.

[fol. 176] "Q. And in all that period you extended 48-hour credit to them? Is that right?

"A. Yes, that is correct.

"Q. Did the Jerome Distributing Company, Inc. have a bond up with you to secure that credit?"

Mr. Stammer: Just a minute. To which we object on the ground it is incompetent, irrelevant and immaterial.

The Court: I think probably it would be material.

Mr. Roche: May it please your Honor, I am perfectly willing to have your Honor sustain the objection to that question.

The Court: All right. Objection is sustained.

Mr. Roche (Reading):

"Q. Don't you require that from shippers or receivers?"

Mr. Stammer: Same objection.

Mr. Roche: It seems to me, may it please your Honor, that that is proper cross-examination in view of the fact that the witness undertook to testify that these checks were not received in payment, but merely in anticipation of payment.

Mr. Stammer: May I say this, your Honor——

The Court (Interrupting): Objection sustained.

Mr. Roche (Reading):

"Q. So that so far as Jerome Distributing Company, Inc. is concerned, you were satisfied with their credit?

"A. We were.

"Q. Now, with regard to the check for $10,433.46, Plaintiff's Exhibit 1, you testified that the check included approximately the freight charges on ten carloads of mer-

[fol. 177] chandise involved in this suit?

"A. That is right.

"Q. Now, there were other charges included in that check, is that so?

"A. Yes.

"Q. Covering other cars?"

"A. Yes.

"Q. Shipped by other shippers than the defendant herein?

"A. That is right.

"Q. And they were shipped to Jerome Distributing Company, Inc.?"

Mr. Stammer: We will object to that on the ground that it would be incompetent, irrelevant and immaterial, if they were shipped to Jerome by other shippers.

Mr. Roche: I want to show, your Honor, that the ten thousand dollar check did not cover only these charges, and therefore it is proper cross-examination on that subject.

The Court: Very good. I think so. Objection is overruled.

Mr. Roche (Reading):

"A. They were either shipped to Jerome Distributing Company, Inc. or reconsigned to if.

"Q. By shippers other than Mid-State Horticultural Company?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche (Reading):

"A. Yes.

"Q. Were those charges paid to you?"

Mr. Stammer: Same objection, your Honor.

Mr. Roche: Well, I think that is proper cross-examination, your Honor.

[fol. 178] The Court: Probably is proper cross-examination. Objection overruled, on that ground.

Mr. Roche (Reading):

"A. None of the other charges in the check for $10,433.46 have been collected.

"Q. When the check for $10,433.46 was returned from the bank what did you do about it?

"A. I asked our special representative in the Treasury Department office in New York to handle personally with Jerome Distributing Company, Inc. As a matter of fact,

he had direct advice from the bank prior to the check's being returned to our office, according to the arrangement in effect.

"Q. When was the check returned by the bank?

"A. The advice of the Chase National Bank is dated November 25, 1932 and was apparently received with a letter from the bank that same date, which reached our office November 26th.

"Q. When did you turn the matter over to your man in New York?"

Mr. Stammer: Just a moment. May I object to that, if the Court please, upon the ground it is incompetent, irrelevant and immaterial. It wouldn't be a defense to the claim against the defendant here, or a waiver of their obligation to pay it.

Mr. Roche: The question, as I see it, is this: The plaintiff found it necessary to take this deposition, and in the taking of the deposition undertook to show these checks [fol. 179] were not received by the plaintiff as payment, but for the purpose of collection. Now, if Mr. Stammer is correct in the legal proposition, it goes to the weight of the evidence, the effect of the evidence at the conclusion of the case, and can not prevent us from conducting a cross-examination of the witness.

Mr. Stammer: We are still able to say, your Honor, that cross-cross-examination on an immaterial point is not a cross-examination, unless it would tend to prove an agreement to accept checks as payment. I don't think it is admissible.

The Court: Objection overruled. I think it is proper cross-examination.

Mr. Roche (Reading):

"A. The ten thousand dollar check was sent to our man in New York on November 28, 1932.

"Q. Did you ever get a report from this man?

"A. Yes. We had reports by telephone.

"Q. When?

"A. The records do not show the date.

"Q. Do the records show a telephone call?

"A. There are some memoranda here that indicate telephone calls.

"Q. When for the first time did the Pennsylvania Railroad notify Mid-State Horticultural Company of the non-payment of the check, Plaintiff's Exhibit 1?"

Mr. Stammer: To which we object, if the Court please, upon the ground it is incompetent, irrelevant and immaterial; that the evidence is inadmissible because it would [fol. 180] not, under the authorities, constitute any defense to the action, the mere failure of the railroad company to notify the person liable for freight; and his failure to collect from any other person, also, would not be any defense.

Mr. Roche: It seems to us that the only objection that can be—could be urged at the present time would be that it is not proper cross-examination. The plaintiff in this case saw fit to have this witness testify respecting this particular subject matter on direct, and certainly, may it please your Honor, we would have the right to cross-examine him; whether the testimony upon direct and cross-examination would benefit us at the conclusion of the case presents an entirely different legal situation.

The Court: Objection is overruled. I'd like to know that.

Mr. Roche (Reading):

"A. As I said before, we had an arrangement with our representative in New York to obtain telephone advice from our depositary and, so far as we know, our representative immediately contacted Joe Fichtelberg, the President, as that was part of his duty.

"Q. Joe Fichtelberg is President of Jerome Distributing Company, Inc., is he not? The question I asked was when for the first time did the Railroad notify Mid-State Horticultural Company in writing of the non-payment of the check?"

Mr. Stammer: To which we make the same objection, if [fol. 181] the Court please.

The Court: Yes.

Mr. Roche (Reading):

"A. I recall very distinctly a meeting we had in the office of Mr. C. B. Sudborough, then General Traffic Manager of the Pennsylvania Railroad, at which our attorneys were also present as well as Mr. Setrakian, of Mid-State Horticultural, during which he was advised while discussing

other matters, that the Company would hold him responsible for the charges on these shipments to Jerome Distributing if we could not collect the amounts from Jerome or if he could not help us in collecting the money.

"Q. When did this conversation take place?

"A. That I do not recall—either late in 1932 or around the summer of 1933.

"Q. In other words, as I understand it, you are testifying from memory? Again I ask you whether you have any written request by the Pennsylvania Railroad from Mid-State Horticultural Company for the payment?

Mr. Stammer: To which I make the same objection, that so far as the payment is concerned——

The Court (Interrupting): Oh, I think that it is proper cross-examination. I think the objection should be overruled.

Mr. Roche (Reading):

"A. I have not the information with me.

[fol. 182] "Q. Now, with reference to the check for $7,035.19, you have testified that that amount included six carloads of the merchandise mentioned in the complaint—rather, the freight charges for six carloads—is that true?

"A. Yes.

"Q. In that check was there included the payment of other carloads of merchandise than those six you mentioned?

"A. Yes.

"Q. And were those for freight charges on carloads of merchandise delivered to Jerome Distributing Company, Inc. by shippers other than Mid-State Horticultural Company?

"A. Yes.

"Q. Have those freight charges been paid?"

Mr. Stammer: May we have the same objection that we made to the question on the other?

The Court: Yes.

Mr. Roche (Reading):

"A. Part of them have been paid.

"Q. How much?

"A. Approximately $700.

"Q. With regard to the check for $9,237.11, you testified that the freight charges on seven of the carloads of merchandise involved in this suit were included in this check. Is that true?

"A. Yes.

"Q. And were there freight charges for other carloads of merchandise delivered to Jerome Distributing Company, Inc. included in that check?"

Mr. Stammer: May we have the same objection to that, if the Court please?

[fol. 183] The Court: Yes. Same ruling.

Mr. Roche (Reading):

"A. Yes.

"Q. And those were by shippers other than Mid-State Horticultural Company?

"A. Yes.

"Q. Were those other freight charges paid?

"A. A portion of them.

"Q. How much?

"A. Approximately $650.

"Q. Now, after these three checks had come back did you take any other action with regard to collection of those three checks, except what you have testified to?"

Mr. Stammer: Now, if the Court Please, I object to that on the ground it is irrelevant, incompetent and immaterial.

Mr. Roche: Well, it is proper cross-examination.

Mr. Stammer (Continuing:) And the evidence is incompetent, irrelevant and immaterial. The evidence of subsequent attempts to collect this check would not be either proof of acceptance of the check in payment, or proof of payment, and would not constitute facts in defense of the liability or the duty of this defendant to pay the freight charges.

Mr. Roche: We certainly have a right to develop upon cross-examination——

Mr. Stammer: (Interrupting) It would not be any proof of the fact that there was an express agreement that they accepted the check in payment.

The Court: I don't know what the answers are, here. Objection is overruled.

[fol. 184] Mr. Roche (Reading):

"A. We had a meeting in this office on December 2, 1932.

"Q. Who was present at the meeting?"

Mr. Stammer: Just a moment. May we have the same objection to all these succeeding questions on this line?

The Court: Yes.

Mr. Roche: I am willing to stipulate to that, your Honor, subject to your Honor's approval.

The Court: Yes.

Mr. Roche (Reading):

"A. J. Hamilton Cheston, Assistant General Solicitor, Messrs. Boardman, Adams and Wahl of the O'Brien firm, Mr. Sudborough, General Traffic Manager, J. W. Roberts, Perishable Traffic Manager, H. J. Freeman, Freight Claim Agent, J. L. Hoagland, Agent at Pier 28, Captain Danielson and Lieutenant Wall of the Railroad's Police Department, John Savage, Jr., Chief Clerk of the Treasury Department, and Martin P. Leger, Special Agent of the Treasury Department office in New York.

"Q. Was there any other effort made to collec- the three checks in question?

"A. Yes.

"Q. What was done?

"A. The Railroad obtained a judgment or judgments against Jerome Distributing Company, Inc.

"Q. When?

"A. I haven't that information with me.

"Q. Do you know when suit was instituted on the checks?

"A. No. I can't tell you that, either.

[fol. 185] "Q. Did you receive any notification from your lawyers informing you when judgment was entered?

"A. Yes, we were advised.

"Q. When?

"A. July 15, 1936.

"Q. Did your lawyers advise you that they had obtained a judgment by default against Jerome Distributing Company, Inc. July 9, 1936?

"A. Yes.

"Q. Did they give you the amount of the judgment?

"A. Yes.

"Q. What was the amount?

"A. $21,294.90.

"Q. Now, since November 22, 1932 did you receive any moneys from Jerome Distributing Company, Inc.?

"A. No.

"Q. Did you continue to deliver merchandise to Jerome Distributing Company, Inc. after November 25, 1932?

"A. I can't answer that question.

"Q. Do I understand you correctly that you are unable to find among the records you have with you any written notification by the Pennsylvania Railroad to Mid-State Horticultural Company requesting payment for the freight charges on the twenty-one carloads of merchandise mentioned in the complaint?"

Mr. Stammer: To which we make the same objection to that made to the previous questions covering that line.

The Court: Objection is overruled.

Mr. Roche (Reading):

"A. I can not find any such written notice among the papers I have with me."

[fol. 186] Mr. Roche: I think the rest is redirect.

(Here a recess was taken for 10 minutes, after which, all parties being present, the following proceedings were had and testimony taken, to wit:)

Mr. Stammer:

In view of the Court's ruling on the question of the cross-examination, we will proceed to read the redirect examination. (Reading:)

"Q. Mr. Savage, you have with you all the papers of record of the Treasurer's Department which might include noticed to you from the firm of O'Brien, Boardman, Conboy, Memhard & Early, or its successor firms, with respect to the institution of suit on any of these checks?

"A. No.

"Q. Or with respect to the entering of judgment in connection with any of the suits that might have been brought thereon, other than the judgment concerning which you testified on cross-examination?

"A. Yes. I have a transcript of a letter from the O'Brien firm, dated June 30, 1936 to the effect that judgment had been entered in the amount of $11,283.55 on June 30, 1936

in favor of the Pennsylvania Railroad against Jerome Distributing Company, Inc.

"Q. I ask this question subject to the Court's ruling on my objections on cross examination to the questions of Mr. Silverman with respect to the institution of suit on the checks concerning which Mr. Savage testified— Were you advised, and by you, I mean the Pennsylvania Railroad, of [fol. 187] any earlier judgments taken against Jerome Distributing Company, Inc.?

"A. I can find no such advice in the papers I have with me.

"Q. Do those papers purport to include all information the Pennsylvania Railroad has concerning judgments of record entered by the Pennsylvania Railroad against Jerome Distributing Company, Inc.?

"A. No.

"Q. So that you are not in a position to testify as to whether any previous judgments were entered on behalf of the Pennsylvania Railroad against Jerome Distributing Company, Inc. from the papers you have in your possession presently?

"A. That is correct.

"Q. Or with respect to the proceedings taken thereafter in an attempt to effect collection of such judgments?

"A. No.

"Q. Now, you testified that a certain amount of money was received by the Pennsylvania Railroad in connection with one or several of the shipments covered by the check for $7,035.19, Plaintiff's Exhibit 2?

"A. Yes. That's right.

"Q. How much was that again? The charges on one car amounting to $682.38—was that car among those involved in this suit?

"A. No.

"Q. And was that payment received from Jerome Distributing Company, Inc.?

"A. No, it was not.

"Q. Now, with respect to the check for $9,237.11, Plain- [fol. 188] tiff's Exhibit 5, you testified a certain amount was received by the Pennsylvania Railroad on a shipment originally purported to be covered by that check—is that correct?

"A. That is correct.

"Q. How much was that amount?

"A. $659.58.

"Q. Was that amount received as freight charges on any of the shipments involved in this case?

"A. No.

"Q. Was it received from Jerome Distributing Company, Inc.?

"A. No.

"Q. Am I correct in understanding, therefore, that it was received from a party other than Jerome Distributing Company, Inc. or Mid-State Horticultural Company and not paid for their account?

"A. Yes.

"Q. Now, was it a general practice of the Pennsylvania Railroad to give freight bills with a 'received payment' stamp, or its equivalent, thereon to a person who paid the freight charges by check and who was on the credit list?"

Mr. Roche: That question is objected to on the ground it is incompetent, irrelevant and immaterial, and not responsive to any of the issues in this case.

The Court: I think in view of the other rulings that the objection should be overruled.

Mr. Stammer (Continuing reading):

"A. Yes, that was the general practice when the bills [fol. 189] are returned with the check.

"Q. And was the purpose of that practice to give the person tendering the check some evidence that he had tendered a check in payment?"

Mr. Roche: Same objection, your Honor, and the further ground it is not proper redirect examination.

The Court: The objection is overruled.

Mr. Stammer (Continuing reading):

"A. Yes.

"Q. And any checks received by the Pennsylvania Railroad—were they received subject to collection?"

Mr. Roche: That is objected to, may it please the Court, upon all the grounds heretofore stated, and upon the further ground that it calls for the conclusion of the witness.

The Court: Well, I think it does, and I think we have the facts with reference to those things before the Court.

Mr. Stammer: I think the same evidence was given on direct examination.

The Court: The objection is sustained.

Mr. Stammer: That is all.

Mr. Roche: The recross-examination, your Honor. (Reading):

"Q. Mr. Savage, these depositions are being taken in the office of Conboy, Hewitt, O'Brien & Boardman, is that right?

"A. Yes.

"Q. And the attorneys who represented the Pennsylvania Railroad in the judgments obtained against Jerome Distributing Company, Inc. on the checks you testified to are the same attorneys?

"A. Yes.

[fol. 190] "Q. Mr. Savage, how much did Jerome Distributing Company, Inc., according to your books, owe the Pennsylvania Railroad December 1, 1932?

"A. Approximately $32,000.

"Q. Did you do any other business with that firm thereafter?

"A. Not that I am aware of."

Mr. Roche: That is all.

Mr. Stammer: If the Court please, we will now read the deposition of GILBERT C. FREEAUF, taken before William H. Vogt, a notary public in and for the County of New York, State of New York, on September 7, 1939, in New York City. (Reading:)

"Q. What is your name?

"A. Gilbert C. Freeauf.

"Q. Where do you reside?

"A. 7 Acorn Place, Bronx, New York.

"Q. By whom are you presently employed?

"A. Marine Midland Trust Company of New York.

"Q. What is the address?

"A. The head office is located at 120 Broadway and I am employed at this branch, 207 East 86 Street.

"Q. What is your position?

"A. Assistant Treasurer.

"Q. Were you employed by the National Bank of Yorkville in November, 1932?

"A. I was.

"Q. What was your position with the bank at that time?

"A. Cashier.

"Q. Was that bank at the same address as the present [fol. 191] bank by whom you are employed?

"A. Yes.

"Q. How long had you been Cashier in that bank prior to November, 1932?

"A. I was elected Cashier in the Spring of 1931.

"Q. Is the Marine Midland Trust Company the successor to National Bank of Yorkville as far as this branch is concerned?

"A. It is.

"Q. And did you continue from November, 1932 to be employed by the National Bank of Yorkville and thereafter, by its successor, Marine Midland Trust Company, up to the present, continuously?

"A. I have.

"Q. And during that tmie you were constantly employed at 207 East 86 Street?

"A. Yes.

"Q. Will you describe your duties as Cashier in November, 1932?

"A. In November, 1932 I was what you might call chief executive of the bank, as far as operations were concerned.

"Q. Specifically, did your duties include supervision of checks presented for payment?

"A. Generally.

"Q. What were your duties with respect to checks presented for payment that were eventually not honored by the bank?

"A. I examined each n. g. item before it was returned by the National Bank of Yorkville during the period under question.

"Q. What do you mean by an 'n. g.' item?

"A. An item that would be dishonored for one reason or another by the National Bank of Yorkville.

[fol. 192] "Q. Coming down to this case, on or about November 22 or 23, 1932, was a check of Jerome Distributing Company, Inc. for $10,433.46, payable to the order of the Pennsylvania Railroad and drawn on the National Bank of Yorkville presented for payment to the drawee bank?

A. On November 23, 1932 a check of Jerome Distributing Company, Inc. payable to the Pennsylvania Railroad in the amount of $10,433.46 was presented for payment to the National Bank of Yorkville.

"Q. Was that check paid by the National Bank of Yorkville?

"A. It was not paid on that date.

"Q. Was it paid on any subsequent date?

"A. No, sir.

"Q. By whom was this check presented for payment?

"A. According to a record I have before me, the check was returned by the National Bank of Yorkville to the Chase National Bank, so we assume that it came from the Chase National Bank when it was originally presented.

"Q. Why wasn't the check paid by the National Bank of Yorkville?

"A. On November 23, 1932 the original ledger records of the National Bank of Yorkville covering the account with it of Jerome Distributing Company, Inc. revealed that there were not funds to meet the item.

"Q. What was done with the check thereafter—after its presentation?

"A. It was returned the afternoon of November 23rd, marked 'short'.

[fol. 193] "Q. What does the notation 'short' mean?

"A. Lack of funds, or insufficient funds—that is another way of saying the depositor or drawer did not have sufficient funds to meet the item—that is correct.

"Q. On or about November 22 or 23, 1932 was a check drawn by Jerome Distributing Company, Inc. for $7,035.19 payable to the order of the Pennsylvania Railroad and drawn on the National Bank of Yorkville, presented to that bank for payment?

A. On November 23, 1932 a check of Jerome Distributing Company, Inc. was presented in the amount of $7,035.19. According to the records before me this check was drawn to the order of the Pennsylvania Railroad.

"Q. Was that check paid when presented?

A. It was not, sir.

"Q. Why wasn't the check paid?

A. Because of lack of funds, or insufficient funds on deposit at the time of presentation to cover this item.

"Q. What was the name of the forwarding bank?

"A. From the records before me, it appears that this item came to us from the Chase National Bank.

"Q. Was the check thereafter returned to the Chase National Bank when it was dishonored by the National Bank of Yorkville?

A. It was returned by the National Bank of Yorkville marked 'insufficient funds' on that particular date.

[fol. 194] "Q. On or about November 22 or 23, 1932 was a check of Jerome Distributing Company, Inc. for $9,237.11 payable to the order of the Pennsylvania Railroad and drawn on the National Bank of Yorkville presented to the National Bank of Yorkville for payment?

"A. On November 22, 1932 a check of Jerome Distributing Company, Inc. in the sum of $9,237.11 drawn to the order of the Pennsylvania Railroad was presented at the National Bank of Yorkville for payment.

"Q. Was that check paid by the National Bank of Yorkville?

A. It was not.

"Q. Why wasn't the check paid by the National Bank of Yorkville?

A. On November 22, 1932 there were not sufficient funds to the credit of Jerome Distributing Company, Inc. to honor or pay this item.

"Q. What was the name of the forwarding bank in that instance?

A. Chase National Bank, Franklin Branch.

"Q. What was done with the check after it was dishonored by the National Bank of Yorkville?

"A. It was returned by the National Bank of Yorkville to the forwarding bank marked 'short'.

"Q. And that expression, 'short' in that case is the same as you described it before in connection with another check?

A. That is correct.

"Q. Now, I show you one of the pieces of paper constituting Plaintiff's Exhibit 4 on this deposition, and ask if that is a usual form of notification by the National Bank of [fol. 195] Yorkville in the case of a dishonored check?

A. That was the usual form, exactly the form, we used at that time.

"Q. I show you another paper, which is part of Plaintiff's Exhibit 6, which also bears the heading 'National

Bank of Yorkville in New York', and ask you whether that was the usual form used in returning dishonored paper?

A. That was the usual form used.

"Q. I also show you another paper constituting part of Plaintiff's Exhibit 3, also bearing the heading 'National Bank of Yorkville in New York' and ask you whether that was the usual form of notification of dishonored paper?

A. That was the usual form used by the bank at that time.

"Q. Mr. Freeauf, do you have a record of checks dishonored by the bank, that is, the National Bank of Yorkville, on November 22 or 23, 1932 with you?

"A. I have before me those original records.

"Q. That record which you just handed me and to which you just testified is headed 'Returned Items'; is that correct?

A. Yes, sir.

"Q. That would be the front and the other, the back, is that correct?

A. That is correct.

"Q. Is this an original record of National Bank of Yorkville?

A. They both are original records of the National Bank of Yorkville.

"Q. What do they purport to show?

[fol. 196] A. They purport to show each and every item that was dishonored on the respective dates of November 22 and 23, 1932—of all items the bank refused for one reason or another.

"Q. Does that record include any reference to the three checks concerning which you previously testified?

"A. It does. There is included on these two sheets, dated November 22 and November 23, 1932 the items we have previously mentioned.

"Q. Now, was this record kept by you or under your supervision?

A. It was kept under my supervision.

"Q. Was it made and kept in the regular course of business?

A. It was.

"Q. Was it necessary, in conducting the business of the bank to make and keep records of this character?

"A. It was.

"Q. And it was usual and customary for the National Bank of Yorkville to make a record of this nature of checks that were returned for one reason or another?

"A. It was.

"Q. Were the records kept in the usual course of business?

A. They were.

"Q. Is this a record of original entry?

"A. These are original records of the National Bank of Yorkville.

"Q. Is it the first permanent entry made by the National Bank of Yorkville concerning matters of this character?

[fol. 197] A. It is the only record kept by the National Bank of Yorkville of all items returned for one reason or another upon any respective date.

"Q. When was the record made?

A. The 'returned item' sheet dated November 22, 1932 was made on that day. Returned item sheet dated November 23, 1932 was made on that day.

"Q. Did the person making the record have personal knowledge of the transactions listed therein?

A. Yes."

Mr. Stammer: It is 12 o'clock. Does the Court want to go ahead?

The Court: Well, it evidently will take some more time. We better, perhaps, take a recess.

Mr. Roche: Anything your Honor desires to do. 2 o'clock?

The Court: Make it 2 o'clock, then.

(Here an adjournment was taken until 2 o'clock p. m.)

Afternoon Session

2 p. m.

(All parties being present, the following proceedings were had and testimony taken, to wit:)

Mr. Stammer: Will you read the last question, Mr. Reporter?

(Record read.)

Mr. Stammer: We will, if the Court please, offer the document attached to the deposition, which is Plaintiff's Exhibit 7.

The Court: All right.

[fol. 198] Mr. Stammer: We will offer these two accounting sheets, November 22, 1932, as Plaintiff's Exhibit 7. And now, if the Court please, we will offer the two accounting sheets attached to the deposition as Plaintiff's Exhibit 8, being of November 23rd, 1932, as Plaintiff's Exhibit 8.

The Court: Admit it.

(Copies of Plaintiff's Exhibits 7 and 8 will be found at the end of this transcript.)

Mr. Stammer: (Continuing reading.)

"Q. Turning for a moment to Plaintiff's Exhibit 7, that is, the sheet entitled 'returned items' and dated November 22, 1932, will you kindly explain for the information of the Court whether that sheet shows the disposition made by the National Bank of Yorkville with the check of the Jerome Distributing Company, Inc. for $9,237.11, payable to the Pennsylvania Railroad?

A. On returned items sheet dated November 22, 1932, which is an original record of the National Bank of Yorkville, I hereby testify the check of the Jerome Distributing Company, Inc. in the sum of $9,237.11, drawn to the order of the Pennsylvania Railroad, was returned marked 'short' on that same date by the National Bank of Yorkville.

"Q. What I am trying to get at, Mr. Freeauf,—perhaps I can put it plainer—is, how do you get that information off that sheet? In other words, I would like you to explain [fol. 199] where and under what columns on that sheet the pertinent information is contained.

"A. This sheet, dated November 22, 1932, deemed or called 'returned items', has the following captions at the top of said sheet: 'Name', 'Amount', 'Number', 'Amount', 'Number', 'Bank', 'Branch', 'Depositor', 'Reason Returned', 'Amount'. On the seventeenth line of this sheet, under the caption 'number' appears '74', which represents the bank that the item was received from and returned to; under the caption 'Branch' appears the name 'Franklin', which means 'Franklin Branch' of the Chase National Bank. Under the caption 'Depositor' is the name of the Jerome Distributing Company, Inc., who were the makers of the item in question. Under the caption 'Reason Returned' appears the word 'short', which is the reason why the

item was dishonored by the National Bank of Yorkville. Under the caption 'Amount' appears the sum of $9,237.11, which is the amount of the item involved. Opposite the amount of $9,237.11 appears 'Penn R. R.', which is a record of whom the item is drawn to or payable to.

"Q. Is that the only information you see on that sheet in connection with that particular item?

"A. That is the only place that the item is listed on this sheet.

"Q. Now I show you plaintiff's Exhibit 8, entitled 'Returned Items' and dated November 23, 1932, and ask you [fol. 200] to explain the various notations on that sheet relating to checks payable to the Pennsylvania Railroad and drawn by Jerome Distributing Company, Inc.?

"A. Sheet dated November 23, 1932 called 'Returned Items' is in substance the same as the sheet previously testified about, dated November 22, 1932. On line 23 on sheet dated November 23, 1932, Plaintiff's Exhibit 8, under caption 'number' appears '74', which happens to be the Chase National Bank. '74' represents the name of the bank that sent the item in question to the National Bank of Yorkville for payment and also represents the bank that the item was returned to by the National Bank of Yorkville. Under the caption 'Branch' appear the numbers '37', which is the number of the branch of the Chase National Bank that the item would eventually be returned to. Under the caption 'Depositor' appears the name Jerome Distributing Company, Inc., who are the makers of the item in question. Under the caption 'Reason Returned' appears the word 'short', which is the reason the National Bank of Yorkville returned said item. Under the caption 'Amount' appears the sum of $7,035.19, which is the amount of the check in question. Opposite the sum of $7,035.19 appears 'Penn R. R. Co.', which is the name of the company the item was payable to. On line 24 on sheet dated November 23, termed 'Returned Items' appears under the caption [fol. 201] 'Number', '74', which is the name of the bank that the item was received from and returned to. Under the caption 'Branch' appears the number '37', which is the branch of the Chase National Bank that the item originally came from and would eventually be returned to. Under the caption 'Depositor' appears the name of Jerome Distributing Company, Inc., who are the makers of the item

in question. Under the caption 'Reason Returned' appears the word 'short', which is the reason why the item in question was refused and returned by the National Bank of Yorkville. Under the caption 'Amount' appears the sum of $10,433.46, which is the amount of the item in question. Opposite the sum of $10,433.46 appears 'Penn R. R. Co.' which is a record of whom the item in question was payable to."

Mr. Roche: Now, if your Honor please, we have the cross-examination of this witness by Mr. Silverman. (Reading.)

"Q. Mr. Witness, when was the Jerome Distributing Company, Inc. account closed?"

Mr. Stammer: To which we object, if the Court please, on the ground it is incompetent, irrelevant and immaterial.

Mr. Roche: Well, it all is certainly cross-examination.

Mr. Stammer: Completely immaterial, because——

The Court: (Interrupting.) I think it would be immaterial, but if it is no worse than that it would not hurt anything.

Mr. Stammer: Well, it wouldn't affect the fact that the check was returned.

[fol. 202] Mr. Roche: Well, that depends altogether, if your Honor please, upon the testimony given by the witness upon direct. Now, they felt that the testimony on direct was material, and certainly we have a right to cross-examine the witness.

Mr. Stammer: I think a question of this sort does not involve the direct examination of all, does not involve whether the check was or was not paid, but only whether the account was closed and other matters of that sort, which do not affect the refusal to pay the check.

Mr. Roche: The purpose, if your Honor please, obviously was to ascertain whether, at a later date, the check was actually—whether any of these checks were actually cashed; and with that object in view the cross-examining counsel undoubtedly wanted to find out when the account of Jerome Distributing Company was closed.

The Court: Well, if you can show that, perhaps that would be material. All right. Objection is overruled.

Mr. Roche: (Continuing reading) "A. The account of Jerome Distributing Company, Inc., was closed some time after June 27, 1933.

"Q. Now, from November 22, 1932 to June, 1933, did Jerome Distributing Company, Inc., make deposits with your bank?"

Mr. Stammer: May we have the same objection to all this cross-examination, your Honor?

The Court: Yes. I think that may be understood.

Mr. Roche: Yes, your Honor. (Continuing reading.)

[fol. 203] "A. They did, sir.

"Q. What was the credit balance on November 22, 1932, of Jerome Distributing Company, Inc.?

"A. At the close of business November 22, 1932 the account of Jerome Distributing Company, Inc., was overdrawn to the extent of $3.42.

"Q. What was the credit balance on November 23, 1932, if any?

A. There was no credit balance. The account was overdrawn then, also.

"Q. Following it down daily, will you give us the credit balances?

A. The first credit balance in favor of Jerome Distributing Company, Inc., appears to be under date of December 31, 1932, when there was the sum of $38.93 to their credit at the close of business December 31, 1932. Up to November 22, 1932, the account of Jerome Distributing Company, Inc., appears to be continuously overdrawn on the books of the National Bank of Yorkville.

"Q. To what extent was it overdrawn?

"A. Various amounts—from day to day it increased.

"Q. What was the largest amount?

"A. At times it was overdrawn to the extent of a few thousand dollars.

"Q. What do you mean 'overdrawn'?

"A. An overdraft on the books of the bank indicates that the account is actually overdrawn and that the party overdrawn owes that sum to the National Bank of Yorkville.

"Q. You mean that you paid out checks that were pre-[fol. 204] sented of the Jerome Distributing Company, Inc., where they had no balance in the bank?

"A. There were times when the National Bank of Yorkville honored certain checks of Jerome Distributing Company, Inc., which overdrew the account.

"Q. Was it ever overdrawn to the extent of $10,000?

"A. From what date?

"Q. From October on?

"A. Well, from November 10, 1932, to the close of business, December 31, 1932, the account was overdrawn in excess of $10,000 during the month of November, 1932.

"Q. That means you had paid out checks drawn by Jerome Distributing Company, Inc., where they did not have sufficient funds to meet them to an extent of over $10,000?

"A. The various overdrafts that occurred on Jerome Distributing Company, Inc., were caused by the National Bank of Yorkville honoring checks, notes or other forms of instruments of Jerome Distributing Company, Inc.

"Q. What date in November was Jerome Distributing Company, Inc., overdrawn over $10,000?

"A. November 14, 1932, the account was overdrawn in excess of $10,000. That seems to be the only day the account was overdrawn in excess of $10,000.

"Q. I think you said it was in December, 1932, that Jerome Distributing Company, Inc., first shows a credit balance of $38. From that time to June did Jerome Dis-
[fol. 205] tributing Company, Inc., ever have a credit balance of $8,000 or more?

"A. From December 31, 1932, to June 27, 1933, the balance at no time reached $8,000 on the account of the Jerome Distributing Company, Inc."

Mr. Stammer: Redirect examination, if the Court please, we offer, in view of the Court's ruling on the introduction of the cross-examination to which we objected.

"Q. On November 22, 1932, were any other checks of Jerome Distributing Company, Inc., presented to the bank and dishonored by National Bank of Yorkville?

"A. On November 22, 1932, there appears an item that was returned by the National Bank of Yorkville marked 'short' of Jerome Distributing Company, Inc., for $3,183.54. This item appears to have been returned to the Chemical Bank & Trust Company and, from the records available, is drawn to the order of the Erie Railroad Company.

"Q. On November 23, 1932, were two checks of Jerome Distributing Company, Inc., payable to the Erie Railroad Company for $2,577.28 and $2,525.08, dishonored by the National Bank of Yorkville?"

Mr. Roche: Now, that is objected to, if the Court please, on the ground it is incompetent, irrelevant and immaterial, and not proper redirect examination.

The Court: Oh, I think it is. If the cross-examination is all right, I think this is. Objection is overruled.

[fol. 206] Mr. Roche: Of course, we get back to the direct, then, your Honor.

The Court: All right.

Mr. Stammer: (Continuing reading) "A. On November 23, 1932, according to the Returned Item sheet, the following checks of Jerome Distributing Company, Inc., were returned by the National Bank of Yorkville marked 'short'. The amounts of these items are $2,577.28 and $2,525.08. Both items, it would appear, were payable to the Erie Railroad Company."

Mr. Roche: (After examining paper handed by Mr. Stammer.) I understand, Mr. Stammer, that you are offering this evidence—you are offering only that part of the record in evidence which starts in with—

Mr. Stammer: Yes, that is all right.

Mr. Roche: On page 1 to and including page 3. I am not objecting to this pamphlet upon the ground no proper foundation has been laid but I am objecting to the introduction in evidence of this order, on the ground that it is incompetent, irrelevant and immaterial; it is an order made by the Interstate Commerce Commission, your Honor, relating to the duties, or some of the duties and functions and authorities of the carrier in connection with transportation charges.

Mr. Stammer: If the Court please, it is offered because it is a Commission order respecting the granting of credit [fol. 207] to shippers. In view of the cross-examination, I think it is wise, in which the extending of credit was brought out, I am offering the two pages numbered 1 and 2, because of the word "order" which appears on the back of the pamphlet.

The Court: Very good. The objection is overruled. It will be received.

The Clerk: Plaintiff's Exhibit No. 9.

PLAINTIFF'S EXHIBIT 9

"ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 20th day of January, A. D. 1931.

Ex Parte No. 73

In re Section 3 of the Interstate Commerce Act as Amended by Section 405 of the Transportation Act, 1920, and Act of March 4, 1927.

IT APPEARING, That on November 1, 1928, upon further consideration of the record and petition of the National Industrial Traffic League, this proceeding was reopened for rehearing and reconsideration:

IT FURTHER APPEARING, That said rehearing and full investigation of the matters and things involved have been had and that the commission on the date hereof has made and filed a report on further hearing containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof:

IT IS ORDERED, that the rules and regulations prescribed in the order of June 4, 1920, in the above-entitled [fol. 208] proceeding be, and they are hereby, modified and that the following rules and regulations be, and they are hereby, prescribed to become effective March 10, 1931, and to remain in force and effect until further order of the commission.

The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as hereinafter set forth.

Where retention or possession of freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit period herein specified, may relinquish possession of the freight in advance

of the payment of the tariff charges thereon and may extend credit in the amount of such charges to shippers for a period of 96 hours to be computed as hereinafter set forth.

Where a carrier has relinquished possession of freight and collected the amount of tariff charges represented in a freight bill presented by it as the total amount of such charges, and another freight bill for additional charges is [fol. 209] thereafter presented to the shipper, the carrier may extend credit in the amount of such additional charges for a period of 30 days from the date of the presentation of the subsequently presented freight bill.

Where icing charges are not published in the tariffs at fixed amounts determinable at the time the shipment moves from point of origin, and where freight charges are prepaid and icing charges are to be paid by the consignor, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period herein specified, may relinquish possession of the freight in advance of the payment of the icing charges and may delay presentation of bills for such icing charges for a period not exceeding 15 days after the end of the calendar month during which the charges accrued and may extend credit in the amount of such charges for 15 days from the presentation of the bill for such charges.

Where the amount of demurrage charges is determinable under average agreements made in accordance with tariff provisions, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period, may delay the presentation of bills for such demurrage charges for a period not to exceed 15 days from the expiration of the authorized demurrage period, and may extend credit in the amount of the demurrage charges accruing during the demurrage period for 15 days from the presentation of the bill for such charges.

[fol. 210] Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight, the 48 and 96 hour periods of credit shall run from the first 12 o'clock midnight following the delivery of the freight.

Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the 48 and 96 hour periods of credit shall run from the first 12 o'clock midnight following the presentation of the freight bill.

Every carrier shall present freight bills for all transportation charges except those herein specifically excepted to shippers prior to the first 12 o'clock midnight following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available to the delivering agent of the carrier.

Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time.

Sundays and legal holidays, other than Saturday half holidays, may be excluded from the computation of the periods of credit.

[fol. 211] The mailing by the shipper of valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of these rules. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time. By the commission, division 3.

George B. McGinty, Secretary. (Seal.)

A true copy:

George B. McGinty, Secretary of the Interstate Commerce Commission." (Seal.)

Mr. Stammer: The Plaintiff rests, if your Honor please.

Mr. Roche: Now, may it please the Court, the defendant in this case moves for a nonsuit in this action as to the amended complaint itself, and as to each of the counts contained in this complaint; likewise for a nonsuit as to the alleged causes of action set forth in plaintiff's amended complaint and as to each of the alleged causes of action set

forth in each of the counts contained in plaintiff's amended complaint upon the following grounds:

First, that the amended complaint filed in this action does not state facts sufficient to constitute a cause of action against the defendant.

[fol. 212] Second, that none of the counts contained in plaintiff's amended complaint state facts sufficient to constitute a cause of action against the defendant.

Third, that the Court lacks jurisdiction of the subject matter of plaintiff's amended complaint, and also lacks jurisdiction of the subject matter of each of the counts contained in plaintiff's amended complaint.

Fourth, that the Court lacks jurisdiction over any of the alleged causes of action set forth in plaintiff's complaint, and likewise, over each alleged cause of action set forth in each and every of the counts contained in plaintiff's complaint or amended complaint.

Fifth, that each of the alleged causes of action contained in plaintiff's amended complaint are barred by the provisions of Section 16, Chapter 1, Paragraph 3, of the Interstate Commerce Act, which is commonly known as 49 USCA, or, rather, it is contained in what is known as volume 49 of the United States Annotated Codes — Codes Annotated.

Sixth, that every and all of the causes of action, or any causes of action based by the plaintiff — based upon any and all of the counts contained in plaintiff's amended complaint, or based upon any of the transactions set forth or related in any of the — in each of the — in each and all of the counts contained in plaintiff's amended complaint, have been destroyed by lapse of time. And that none — that no cause of action, or alleged cause of action based upon any of the transactions set forth in plaintiff's complaint, or [fol. 213] based upon any of the counts contained in plaintiff's amended complaint, was in existence or enforceable on the date upon which this action was commenced.

Seven, upon the ground that prior to the commencement of the above entitled action, this court had lost, and therefore had not obtained jurisdiction to entertain here, try, determine, or determine said action or to enter any judgment against the defendant in said action, either upon the

amended complaint or upon any of the counts contained in the amended complaint, or upon any alleged cause of action set forth in plaintiff's amended complaint or in any of the counts contained in that pleading.

Eight, that the alleged waiver of the statute of limitations signed by the defendant, dated October 25, 1935, and which is described in plaintiff's amended complaint, and, I believe, attached thereto as plaintiff's C, is null and void and of no effect, upon each and every of the following grounds, and for each and every of the following reasons:

a. The provisions of Section 16, Chapter 1, Paragraph 3 of the Interstate Commerce Act, 49 USCA, could not legally or otherwise be waived by the defendant;

b. Any cause of action that could exist in favor of the plaintiff against the defendant was destroyed upon lapse of three years from and after the date upon which said cause of action accrued, and could not, therefore, be legally revived by the execution by the defendant of any waiver of the statute of limitations, or any of the provisions of Sec- [fol. 214] tion 16, Chapter 1, Paragraph 3 of the Interstate Commerce Act;

c. That said alleged waiver was and is not effective as against Section 16, Chapter 1, Paragraph 3 of said Interstate Commerce Act, and was and is in violation of the provisions of said Act and the provisions of Section 16, Chapter 1, Paragraph 3 thereof;

d. That the execution of such alleged waiver of the statute of limitations, and the provisions of said Section 16, Chapter 1, Paragraph 3 of the Interstate Commerce Act could not legally revive any cause of action which became destroyed upon the lapse of three years from the date upon which said cause of action accrued;

e. That Section 16, Chapter 1, Paragraph 3 of said Interstate Commerce Act constitutes a limitation upon the right to institute an action by a carrier for the recovery of transportation charges, and that such limitation upon such right can not be waived by the individual or entity against whom such right exists;

Also upon the ground that the evidence in this case discloses without conflict that the plaintiff in this case looked to the credit of the Jerome Distributing Company for the payment of its transportation, or freight transportation charges, and which, of course, includes freight, demurrage,

handling and refrigerating charges and so forth, and did not look to the defendant in this case, and that it relied upon the credit of the Jerome Distributing Company, and that, [fol. 215] in payment of these freight charges, transportation charges, it accepted checks from the Jerome Distributing Company; and that from all of the evidence in this case it is obvious that an agreement had been established, existing between the plaintiff on the one side and the Jerome Distributing Company upon the other, that the checks which were — which, the evidence discloses, were delivered to the plaintiff in this case by the Jerome Distributing Company, should be regarded and relied upon as payment of these transportation charges; that at no time did the plaintiff in this case ever rely upon the defendant in this case for the payment of those transportation charges, and certainly did not rely upon either the liability or the credit of the defendant in this case at the time it delivered the cars to the Jerome Distributing Company containing the freight which is the subject matter of plaintiff's amended complaint, and each of the counts contained in that complaint.

Now, I want to say this, your Honor, — your Honor stated the other day you did not care to have this case orally argued, and because this motion goes to the very meat of this litigation, if your Honor is still of the same opinion, and your Honor will prefer to have this case briefed, even after those briefs come in, your Honor may desire to hear oral argument; I'd suggest your Honor reserve a ruling upon this motion, and your Honor can determine it when your Honor determines this case, if that is agreeable to Mr. [fol. 216] Stammer.

The Court: Yes, that is agreeable to the Court.
Mr. Stammer: Yes.
Mr. Roche: All right. Will you take the stand?

Arpaxat Setrakian, called as a witness on behalf of defendant and being first duly sworn, testified as follows:

Mr. Roche:

Q. Mr. Setrakian, where do you reside, please?
A. In Fresno.
Q. How long have you resided in Fresno?
A. Oh, some thirty years.

Q. What is your business or occupation?

A. I am engaged in the growing, packing and shipping of grapes.

Q. Are you an officer of the defendant in this case, Mid-State Horticultural Company?

A. I am.

Q. What particular official and position do you hold in that—in that particular corporation?

A. I am vice president and general manager.

Q. During the months of October, November and December of 1932 were you then an official connected with the defendant?

A. Yes, sir, I was.

Q. What was your official position with the defendant during those three months?

A. Vice president and general manager.

Q. Have you, continuously, since December, 1932, been the vice president and general manager of the defendant? [fol. 217] A. Yes, sir.

Q. And you were such vice president and general manager during the shipment of the various carloads of grapes which constitute the subject matter of this particular case?

A. Yes, sir.

Q. Is that correct? Now, state, if you will, please, whether at any time during the latter part of 1932 you were in New York?

A. No, sir, I was not.

Q. When, for the first time, did you visit New York after December—after October, November and December, 1932?

A. February 12, 1933.

Q. Now, state if you will, please, when, for the first time you were advised that the transportation charges connected with the shipments described in plaintiff's amended complaint on file in this action, were paid by the Jerome Distributing Company—were paid or were purported to have been paid by the Jerome Distributing Company to the plaintiff in this case by check or checks.

Mr. Stammer: To which, if the Court please, we object on the ground it is incompetent, irrelevant and immaterial, the plaintiff in the case having no duty to advise the defendant of the nonpayment of the freight, and any lack of such notice not being a defense to an action for freight charges under the bill of lading which was executed by the defendant.

Mr. Roche: Your honor will recall the witness testifying to when, for the first time, any notice was given to the Mid-[fol. 218] State, or any demand made upon them respecting these alleged unpaid charges, or when for the first time any demand was made upon the defendant for the payment of these transportation charges. I am examining this witness at this time, your Honor, merely in response to the testimony contained in that deposition. Your Honor will remember, Mr. Savage said that—as I recall his testimony—that from his recollection, the first mention that was made to defendant in this case was the fact these charges—that it was claimed these charges had not been paid, was at a meeting held in New York during the latter part of 1932 or early part of 1933. I want to fix the date of that conference and show when the information first came to this witness.

Mr. Stammer: We objected to the same evidence offered on cross-examination by Mr. Savage.

Mr. Roche: May I have that last exhibit, please?

Mr. Stammer: My position then was that the evidence could not possibly be relevant or competent or material to any defense in this case.

The Court: It appears to me that this witness should be permitted to testify to the time when that information was conveyed to him.

Mr. Roche: May I say this before your Honor—although I understand your Honor is about to overrule the objection

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The Court: I was about to.

Mr. Roche: I want to call your Honor's attention to the [fol. 219] last exhibit put in evidence here, that is, the order of the Interstate Commerce Commission, Plaintiff's Exhibit —I think it was number 9. (Reading:) "The mailing by the shipper of valid checks, drafts or money orders, which are satisfactory to the carrier in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of these rules. In case of dispute as to the time of mailing, the post mark shall be accepted as showing such time." I invite your Honor's attention to that language which I only read in the last few moments, for the purpose of pointing out to your Honor that under the regulation of the Interstate Commerce Commission itself, the commission recognizes that a carrier has the right, in certain circumstances, to accept a check or

checks in payment of transportation charges; and our contention is, may it please your Honor, and will be, when we come to argue this question if we deem it necessary, that under certain circumstances, including the circumstances disclosed by the record in this case, that not only was the railroad company justified in relying upon the line of credit which it had undoubtedly furnished to the Jerome Distributing Company, but, likewise, had a right to rely upon the checks which it received from that company, and which in our—as we understand this case, it accepted in payment of these charges.

Mr. Stammer: If course, if the Court please, the Court [fol. 220] will assume that such checks are valid checks.

The Court: That is true.

Mr. Stammer: I don't think that would make the testimony any more relevant. However, the Court has ruled.

The Court: All right. Objection is overruled.

Mr. Roche: May I have that question read to the witness, please?

(Question read.)

A. June 26, 1933.

Mr. Roche:

Q. You were present in court when the testimony given by Mr. Savage during the taking of his deposition was read?

A. Yes, sir.

Q. You recall the conference to which he referred while testifying, during the taking of that deposition?

A. Yes, sir.

Q. When did that conference occur?

A. June 23, 1933.

Q. That, as I understand it, was the first time that you ever heard of this claim made by the plaintiff that the charges had not been paid?

A. That is right.

Mr. Stammer: Same objection, if the Court please. Same ruling.

Mr. Roche: Now, do you know— did you know a man by the name of J. W. Roberts?

A. Very well.

Q. Who was connected with the plaintiff in this case?

A. Yes, sir.

Q. Where was Mr. Roberts located— that is, where was his office located?

[fol. 221] A. Mr. Roberts' office was located on Pier 22, I believe, of—where the Pennsylvania Railroad Company had its district offices.

Q. When you say his office was located upon this pier, are you referring to the time—are you referring, among others, to the months of October, November and December, 1932?

A. Yes, sir; it has been there all the time.

Q. All right. Now, state if you know whether he had any official position with the plaintiff in this case, that is, the Pennsylvania Railroad Company?

Mr. Stammer: Objected to, if the Court please, on the ground it is a pure conclusion of this witness.

Mr. Roche: I am asking if he knows, your Honor.

The Court: Yes.

A. Oh, yes; Mr. Roberts was general traffic manager in charge—general traffic manager of perishable commodities that came into the New York district, what we call the Manhattan district.

Mr. Roche: That is, for the plaintiff in this case.

A. That is right.

Q. Employed by the plaintiff, is that right?

A. That is right.

Q. Did you, from time to time have transactions with Mr. Roberts in his capacity as traffic manager for the plaintiff?

A. Oh, yes.

Q. Covering how many years?

A. Oh, I'd say not less than 20 years. I am not definite to the number of years, but for many years.

[fol. 222] Q. Well, were any of those transactions in which he engaged repudiated by the railroad company?

Mr. Stammer: To which we object, if the Court please, not proof of any competency or capacity or authority of——

The Court: I can't see its materiality.

Mr. Roche: We would have a right to show, may it please the Court, that the plaintiff in this case acted upon transactions which were engaged in by Mr. Roberts, presumably as its agent, and that no objection was ever made by the railroad company to his acting in that capacity, for the purpose of showing ostensible agency.

Mr. Stammer: I don't think that would be proof of any ostensible agency at all, if the Court please. A man might have no connection with the railroad company—the railroad company might not even know it——

The Court: Objection overruled. I will hear what he says, reserving the right to pass upon the sufficiency at a later date.

A. We looked upon Mr. Roberts as representing the Pennsylvania Railroad Company whenever he made any commitments——

Mr. Stammer: Just a moment, if the Court please.

Mr. Roche: Yes, that answer may go out. What was the character of the transactions in which you engaged with Mr. Roberts? Well, say for a number of years prior to the month of January, 1933?

A. We would approach Mr. Roberts as to the standing of the receivers, as to the credit that they enjoyed with the Pennsylvania Railroad, and whether or not the Pennsyl- [fol. 223] vania Railroad Company deemed the receiver a responsible person to represent us in the city of New York.

Mr. Stammer: If the Court please, we move to strike out the answer on the ground that it is incompetent, irrelevant and immaterial, and not binding upon the plaintiff, no authority has been shown for any such transaction.

The Court: Objection is sustained.

Mr. Roche: Q. Did you from time to time for a period of some years prior to the month of January, 1933, engage in transactions with the plaintiff in this case, the Pennsylvania Railroad Company, which transactions were actually participated in between yourself, representing the Mid-State and Mr. Roberts, representing the railroad company?

A. Yes, we did, on December 6th and 7th—there was a question of cars not being——

Mr. Stammer (interrupting): That is a voluntary statement, and I ask that the answer be stricken.

Mr. Roche: Q. State whether from time to time you took up with Mr. Roberts the settlement of claims which were being made by the Mid-State against the plaintiff in this case.

Mr. Stammer: To which we object on the same grounds.

The Court: I think that is all right. Objection is overruled.

A. May I have the question read?

Mr. Roche: Yes.

[fol. 224] (Question read.)

A. Yes, we did, in 1932, 1931 to 1933.

Q. As a result of negotiations and conferences between yourself, representing the Mid-State on the one side, and Mr. Roberts on the other side, were checks paid by the plaintiff in this case to the Mid-State?

A. The plaintiff in this case would send the checks to Mr. Roberts' office and then it would be turned over to us.

Q. Were there a great many transactions of that character handled between yourself and Mr. Roberts during the period of time to which I have referred?

A. Yes, many.

Q. Now, state whether, on the 7th day of December—I will withdraw that question. State whether during the early part of December, 1933, or, 1932, there was called to your attention some delay in the delivery of freight cars loaded with grapes emanating from the defendant in this case, in connection with their delivery to the Jerome Distributing Company in New York?

Mr. Stammer: To which we object on the ground it is incompetent, irrelevant and immaterial, not addressed to any issue in this case.

Mr. Roche: Just a preliminary question, your Honor, that's all.

The Court: All right. Objection overruled.

A. Yes: On December 6, 1932, I was informed that some of the cars that were attempted to be delivered for sale were [fol. 225] not delivered for sale, and I wanted to know from Mr. Roberts what was the reason, why these cars were not delivered for sale, and Mr. Roberts sent a wire dated December 7th——

Mr. Stammer (interrupting): Which we move the Court to strike on the ground it is not addressed to any issue in this case, incompetent, irrelevant and immaterial.

The Court: Well, I don't—well, to what issues in the case——

Mr. Roche: I simply want to lay the foundation for the offering of the telegram, your Honor, that's all.

The Court: For that purpose the objection is overruled.

Mr. Roche: It is a fact, is it not, that those cars were not the cars that are involved in this particular action?

A. No, sir, they were not.

Q. That is correct?

A. Yes, sir.

Q. I call your attention to a telegram which is dated December 7, 1932, and ask you whether you ever saw that telegram before?

A. Yes, sir. That telegram came to us, the Mid-State Horticultural Company.

Q. When?

A. On the 7th of December.

Q. Is this the original of the telegram that you received?

A. That is right.

Q. Over the lines of the Western Union Telegraph Company, is that correct?

A. Yes, sir.

Mr. Stammer: May I see it?

Mr. Roche: Q. Was that wire sent to you in response to a wire which you sent?

[fol. 226] Mr. Stammer: Just a moment. I don't want the entire telegram described before I have an opportunity to read it.

Mr. Roche: Excuse me. (Handing telegram to Mr. Stammer.)

Q. Was that telegram I have just shown you, dated December 7, 1932, received by you in response to a telegram which you had sent to J. W. Roberts, Pennsylvania Railroad, Pier 29, North River, New York?

A. Yes, sir. The telegram under date of December 7, is an answer to the telegram under date of December 6th, which I sent to Mr. Roberts.

Q. Now, I call your attention to what purports to be a copy of a telegram dated December 6th, 1932, emanating from Fresno, California, addressed to J. W. Roberts, Pennsylvania Railroad, Pier 29, North River, New York, signed Mid-State Horticultural Company, and tell me whether you ever saw the original of that wire before?

A. I have dictated that telegram myself.

Q. When and where did you dictate it?

A. In my office at Fresno on the evening of December 6th.

Q. And that whether—state what became of the original of that telegram after it had been dictated by you and typed by the stenographer?

A. The original was given to the Western Union for dispatch to Mr. Roberts.

Q. All right. I am correct in stating, am I not, that the telegram which I first showed you, which purports to be a wire from J. W. Roberts to the Mid-State Horticultural Company under date of December 7th was the reply?

[fol. 227] A. Yes, sir.

Q. Which you received the next day?

A. Yes, sir, that was the reply.

Mr. Roche: We offer these two telegrams in evidence, your Honor, first, the telegram of December 6, 1932, being a wire from Mid-State Horticultural Company to J. W. Roberts, Pennsylvania Railroad, Pier 29, North River, and the response to that telegram, signed by—purporting to be signed by J. W. Roberts, and addressed to Mid-State Horticultural Company, sent from New York and dated December 7, 1932.

Mr. Stammer: If the Court please, I will object to the telegram of December 6, 1932, that has been offered in evidence by the defendant, on the ground it is incompetent, irrelevant and immaterial, not pertinent or admissible on any defense to the action. The telegram, which I will ask the Court to read, is not one which would indicate payment of the freight; it does not show any fact which could be raised in defense of the liability of the defendant here to pay the freight on those cars. So far as the allegations of the complaint are concerned, in regard to transportation and delivery and execution of the bill of lading and all those matters are admitted, and the complaint is one here of payment. Or, if some other defense, other than payment, which, I think, has not been indicated, except the question of the statute of limitations, now, it is our position that no wire from this defendant to the Pennsylvania, or any wire [fol. 228] in response to it could in any way affect the duty of the railroad to collect this freight, or, the duty of the defendant to pay it; and, estoppel is not available to them

under the law, and this wire, therefore, it seems to me to be totally outside of any issue in the case.

Mr. Roche: I might say to your Honor, so your Honor will understand our position with respect to the wire, which your Honor has now before you, that wire is being offered only for the purpose of showing—establishing a foundation for the next wire which I directed the witness's attention to, being the wire sent by the—sent to the witness by Mr. Roberts. That wire is the material one. This wire here, may it please your Honor, is nothing more or less than to have a foundation for the other wire.

The Court: What do you say to that?

Mr. Stammer: I object to this upon the same ground. There is nothing in this telegram which would have the slightest effect upon the obligation of this defendant to pay these charges. The law is that an attempt to collect from the consignee is not a defense to an action for charges on the part of a person. And there isn't available any estoppel which can be raised, and if there were, so far as this telegram is concerned, which I will show your Honor, it would be incompetent to prove any element of their defense.

Mr. Roche: I am willing to withdraw the wire which I first offered, that is, the wire that was sent by the Mid- [fol. 229] State Horticultural Company to Mr. Roberts under date of December 6, 1932, if no objection is made to the second wire, upon the ground that no proper foundation has been laid; but inasmuch as that objection is being insisted upon, it compels me to offer in evidence the first one, merely for the purpose of laying the foundation for the second.

The Court: Well, I think that this wire might have some effect on some of the contentions made by the defendant. I think I will overrule the objection and take it—admit it in evidence, anyway.

Mr. Roche: I will ask the first wire be marked Defendant's Exhibit A, and the second wire be marked Defendant's Exhibit B. I suppose it may be understood, your Honor, that all these exhibits are actually read in evidence. Your Honor just read these two telegrams.

Mr. Stammer: Yes, it will be stipulated that all exhibits be deemed read in evidence.

DEFENDANT'S EXHIBIT "A"

Western Union

Fresno Calif Dec. 6 1932

J W Roberts
Pennsylvania Railroad Pier 29 North River
New York NY

Brother advises your line refuses bring our cars due embargo Stop Unable understand why embargo now when government reports clearly indicate plenty track facilities available Stop This unnecessary delay subjecting us undue loss please cooperate Stop We are bonded for freight charges and our bond neither canceled nor request [fol. 230] ~~6~~ increase made Stop While unfamiliar with legal ramifications still believe originating and connecting carriers under legal liability to deliver cars final destination and if defecits arise look shipper for payment Stop We now ask that permits be issued on all our cars as delay will mean loss please advise

Mid State Horticultural Co."

DEFENDANT'S EXHIBIT "B"

"Western Union

1932 Dec 7 AM 8 22

FA66 Cak= NewYork NY 7 1106A
Midstate Horticultural Company—
Fresno Calif—

Your brother has made no requests on us for permits Jerome Distributing constantly has made requests and where they have satisfied us charges will be paid when cars are turned over to them Permits have been issued promptly Will see brother today.

J. W. Roberts."

Mr. Roche:

Q. Now, Mr. Setrakian, you recall being present in court, as you have already testified, during the reading of the deposition of Mr. Savage?

A. Yes, s.r.

Q. You recall that upon his—that during his cross-examination Mr. Savage testified that certain freight bills relating to the particular cars and cargoes which constitute the subject matter of the present action, were signed by the Pennsylvania Railroad Company, do you recall that?

[fol. 231] A. Yes, sir.

Q. I think he testified to that not only upon cross- but upon direct. Now, I'd like to have you tell me if you will, please, whether any of those receipted freight bills were received by you, and when I say "by you" I mean by the Mid-State, the defendant in this case.

Mr. Stammer: To which we object, if the Court please, upon the ground it is incompetent, irrelevant and immaterial. An issuance of receipt on a freight bill by the carrier is not a defense to the action, in case they haven't been paid; and there is no defense of estoppel.

Mr. Roche: I understand your Honor to strike that defense out, in our amended answer, but nonetheless, your Honor will recall that this testimony was developed for the first time in this case by the plaintiff at the trial, at the reading of these two depositions, the first being the deposition of Mr. Savage. I am not going to occupy very much time putting in this evidence, I simply want to, if I am permitted to do it, introduce in evidence one of these freight bills, and then have this witness testify from that bill, which is comparable to the other bills, which were presented by the plaintiff, and receipted by the plaintiff.

The Court: Well, there is no question about that, is there?

Mr. Roche: Well, I want to get the freight bill before the court, one of the freight bills before the court, your [fol. 232] Honor, because none of these bills were introduced in evidence during the taking of the depositions. Only take a few minutes.

The Court: All right.

Mr. Roche: I will say this, your Honor, if Mr. Stammer is correct as to the law, even though this evidence comes in here, it will not be harmful to the plaintiff.

Mr. Stammer: I just want my objection for the record. I want it clear that I am objecting also on the ground it would not be evidence of payment, in any event.

The Court: All right. It is understood that all this line of testimony comes in under the same objection and pursuant to the same ruling.

Mr. Roche: May I have that question read, then, to the witness.

(Question read.)

A. Yes, sir.

Q. Now, I call your attention to what purports to be a freight bill upon the stationery of the Pennsylvania Railroad Company, and ask you whether that is one of the freight bills that relates to one of the cargoes involved in this case?

A. Yes, sir, that is one of the freight bills.

Q. Now, I notice that this freight bill, among other things, is marked as follows: Car, initials and number, PFE 71097. PFE 71097 identifies the car, does it not?

A. That is right.

[fol. 233] Q. That is one of the cars involved in this action and one of the cars so identified in the complaint, in the amended complaint, also in the deposition of Mr. Savage?

A. Yes, sir.

Q. I notice also that this freight bill is receipted?

A. Yes, sir.

Q. By the plaintiff. The receipt is dated November 22, 1932?

A. That is right.

Q. The stamp being "Paid Nov. 22, 1932"—I can't read the rest of it. Now, directing your attention to this particular freight bill, how quickly after November 22d, 1932 did you receive this bill?

A. I would say within three or four days after the car was disposed of.

Q. State, if you will, please, whether comparable bills, comparably receipted, were received by the defendant in this case with respect to each of these cars within three or four days after the date on which the receipt—the freight bill was receipted?

A. I believe so.

Q. From whom did the defendant in this case receive these receipted freight bills?

A. The Jerome Distributing Company.

Q. You would testify, would you, that a comparable freight bill, receipted by the plaintiff in this case, was received by Mid-State from the Jerome Distributing Company within three or four days after the receipt was signed?

A. Yes, sir.

[fol. 234] Q. That related to every one of the cargoes that is involved in this case, is that right?

A. Yes, sir, positively.

Q. What, if anything, became of the bills, themselves, or receipted bills, outside of the ones that I have here?

A. I know what become of them. There was some adjustments on breakage, and whenever claims are adjusted by the carrier we return the freight bills back to them. On this car, apparently there was no breakage, so that freight bill remained in the files.

Mr. Stammer: That isn't necessary, Mr. Roche. You can introduce it in evidence if you want to.

Mr. Roche: I simply want to account for the absence of the receipted freight bills, your Honor. In other words, you have none of these receipted freight bills in your possession at the present time?

A. No, sir. They must be either in Pennsylvania's possession, or connecting carrier's.

Q. They were returned by you to the plaintiff in this case?

A. Yes, sir.

Q. With claims?

A. With their claims.

Q. I'd like to have you tell me, if you will, whether between the months of October, November and December, 1932 and the month of June, 1933, when you say for the first time you learned that there was a claim being made by the plaintiff in this base that these charges had not been paid, whether you frequently came in contact with the offi-
[fol. 235] cials of the plaintiff in this case?

A. Yes, sir.

Mr. Stammer: Object to that as incompetent, irrelevant and immaterial, not proof of any defense in the action, and being indefinite, no foundation being laid as to who the parties were, or——

The Court: (Interrupting) I don't think that would be admissible.

Mr. Roche: If your Honor please—that testimony is not admissible, you say?

The Court: I don't think so.

Mr. Roche: The witness answered in the affirmative. I would lay the foundation by showing who they were, but

I could not do it until I found out whether he actually came in contact with them or not. And what I want to show—I'd like to have the record contain this statement, I desire to show that between October, November and December of 1932 and the date of the conference in June, 1933, when the witness learned—when the witness the first time learned that these claims were made by the plaintiff, these charges were not paid by the Jerome Distributing Company, that he did, from time to time, come in contact not only with Mr. Roberts but with other officials of the railroad company in connection with the adjustment of claims being made by the Mid-State against the plaintiff in this case, and that notwithstanding the fact that these claims were discussed, and notwithstanding the fact that in every in-
[fol. 236] stance claims were paid by the Pennsylvania to the Mid-State, nothing was said about any claims on the part of the—on the part of the plaintiff against the defendant, arising out of these transportation charges.

The Court: Isn't that all covered by his testimony?

Mr. Stammer: As far as that is concerned, the testimony would be immaterial, unless counsel, again, is trying to prove something going to the question of estoppel. Either we had to notify him or we did not. He states he wasn't notified. This would be all incompetent, irrelevant and immaterial.

Mr. Roche: I simply want the record to show, may it please your Honor, in connection with the question which I just put to this witness, we make that offer of proof, that is all, and then the objection can run to the question. That is all.

Mr. Stammer: The Court sustained the objection?

The Court: It has.

Mr. Stammer: That is all.

Mr. Roche: That is the case, your Honor. I want to state, I promised Mr. Stammer I'd get through by 3 o'clock.

The Court: It is pretty close to it. It is my suggestion, Mr. Roche, that inasmuch as you base your principal contention on your motion for nonsuit, that you take the burden.

Mr. Roche: I am perfectly willing to assume that, your Honor.

The Court: Is that all right with you?

[fol. 237] Mr. Roche: Does your Honor have any objection to letting me have 15 days to file the brief in this case?

I have to proceed with another trial in San Francisco on Monday.

The Court: I have no doubt it will be more than 15 days.

Mr. Roche: Mr. Stammer, which characterizes his usual generosity, suggests I take 20, instead of 15, your Honor.

The Court: 20, 20 and 10?

Mr. Roche: That will be all right.

The Court: Mr. Roche has to take the burden.

Mr. Roche: I am perfectly willing to file the first brief, your Honor. In fact, after we file that, Mr. Stammer may not want to reply. And, if your Honor please, I had not formally offered this freight bill in evidence. We offer it in evidence now, and ask that it be marked next in number. That will be Defendant's Exhibit C.

Mr. Stammer: We object to it, if the Court please, upon the grounds stated previously.

Mr. Roche: And the objection is overruled?

The Court: Objection overruled.

(Copy of Defendant's Exhibit C will be found at end of this transcript.)

[fols. 238-239] Notice of Appeal omitted. Printed side page 129 ante.

[fols. 240-241] Notice to Clerk to Prepare Papers for Record on Appeal Pursuant to Section 953-a of the Code of Civil Procedure Omitted. Printed side page 131 ante.

[fol. 242] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 243] [File endorsement omitted.]

[fol. 244] IN SUPERIOR COURT OF FRESNO COUNTY

JUDGE'S CERTIFICATE

STATE OF CALIFORNIA,
County of Fresno, ss:

I, H. Z. Austin, Judge of the Superior Court of the State of California, in and for the County of Fresno, do hereby certify that no objection having been made to the foregoing transcript within five days after the receipt thereof by myself, I do certify the same to be true and correct, and it is hereby settled and allowed.

Dated at Fresno, California, this 23 day of June, 1941.

H. Z. Austin, Judge of the Superior Court.